IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-672

T.I.M.E.-DC, INC.,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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The petitioner, T.I.M.E. - DC, Inc. ("T.I.M.E. - DC"), respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 8, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 517 F. 2d 299 and is reproduced in the Appendix to Petition for Certiorari recently filed by the International Brotherhood of Teamsters ("IBT") in No. 75-636 (App. 1).[1]

The pertinent District Court's preliminary opinions are reproduced in the IBT Appendix as follows:

December 31, 1971, 335 F. Supp. 246;
4 F.E.P. Cases 77 (App. 45)

January 20, 1972; 4 F.E.P. Cases 875
(App.50)

[1] Reference herein is made to that Appendix ("App.") with the knowledge and permission of counsel for IBT.

October 19, 1972; 6 F.E.P. Cases 690
(App. 56)
December 6, 1972; 6 F.E.P. Cases 703
(App. 79).

The District Court's "Final Order," dated March 2, 1973, unreported, is reproduced in the IBT Appendix (App. 94).

The District Court's Order of March 19, 1973, also unreported, amending the "Final Order," is reproduced in the IBT Appendix (App. 117).

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1975 (App. 1). This petition of certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1.

Are statistics reflecting a present disparity in the proportion of white versus minority incumbent employees "dispositive" in a pattern and practice suit under Section 703 of Title VII of the Civil Rights Act of 1964, where the Court of Appeals has found that the employer has made "a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment"?

2.

In fashioning a remedy in a pattern and practice case does a District Court have discretion to award relief to individuals on the basis of the degree of injury suffered by each individual (as held by the District Court), or must all minority employees in the affected class be awarded relief, regardless of the injury suffered (as held by the Court of Appeals)?

3.

Are there different standards for determining individual relief under Title VII of the Civil Rights Act of 1964, depending upon whether the suit is an individual or a class action, or a pattern and practice suit?

4.

Where a union contract provides that laid off employees have first call to reinstatement rights for a three-year period, may individual minority employees who have never been employed in such positions and who are not found to have been affected by racial discrimination be granted priority over laid off employees?

STATUTORY PROVISIONS INVOLVED

Sections 703(a) through (j) and 707(a) through (e) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. Sections 2000e-2(a) through (j) and 6(a) through (e), are reproduced in the IBT Appendix (App. 119 to 124).

STATEMENT OF THE CASE

A

The Facts

As stated by the Court of Appeals, "This governmental pattern and practice suit is one more in an ever-increasing number of Title VII employment discrimination cases arising out of the trucking industry and primarily involving the past exclusion of minority group members from the job of over-the-road line-driver."[2] The Attorney General sued T.I.M.E. - DC, a transcontinental common motor carrier, and IBT under Section 707(a) of Title VII of the Civil Rights Act of 1964, as amended, alleging that the defendants were engaged in a pattern and practice of discrimination with respect to the employment of black and Spanish-surnamed American (SSA) persons.[3]

The essence of the government's claim was that T.I.M.E. -DC and its predecessors[4] had discriminated by assigning blacks

[2] 517 F. 2d 299, 302; App. 1,2.

[3] Two separate suits were brought and ultimately consolidated for trial, the first alleging a pattern and practice of discrimination at the employer's Nashville terminal and the second charging T.I.M.E. -DC and IBT with engaging in a pattern and practice of discrimination on a systemwide basis.

[4] T.I.M.E. -DC's merger history is set forth in the Opinion of the Court of Appeals at 517 F. 2d 299, 304; App. 5.

and SSA's to lower paying and less desirable job classifications while reserving for whites the higher paying and more desirable classifications, by refusing to promote or transfer minority employees to more desirable positions and by maintaining a system of promotions and transfers which perpetuated the effects of the company's past discrimination. It was also the claim of the government that IBT (by itself and through its Area Conferences and Locals) engaged in a pattern and practice of discrimination by entering into contracts which tended to perpetuate the effects of the employer's past discrimination by impeding the transfer of blacks and SSA's to more desirable jobs.

The contractual provisions in question are neutral on their face and (with one exception[5]) do not prohibit employees from transferring from one classification to another. However, it was alleged that the union contracts operated "to impede the free transfer of minority groups" inasmuch as a transferring employee could not carry over his seniority from one classification (unit) to another for lay-off and bid purposes. (Four separate units are created under the contracts: road, city, garage and office. An employee's unit seniority, which is computed from the date of his entry into that unit, is utilized to determine bid preference, lay-off and recall. Company seniority, on the other hand, is measured from date of hire and is utilized to compute fringe benefits such as vacations, pensions and holidays.)

B

The Consent Decree

During the course of the trial in the District Court the government and T.I.M.E.-DC entered into a consent decree[6] which "resolved those issues relating to T.I.M.E.-DC's alleged practice of hiring discrimination and its resulting obligation to affirmatively recruit and hire qualified Blacks and Spanish-surnamed Americans as new employees, and its alleged obligation to provide monetary compensation for those blacks and Spanish-surnamed Americans whom the United States alleged were individual and class victims of past discrimination."[7]

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[5] Relating to the Memphis terminal from 1958 to 1968.

[6] "Decree in Partial Resolution of Suit," App. 85.

[7] Government's Brief to the Court of Appeals, pp. 4-5.

The consent decree, a portion of which was expressly adopted by the District Court in its final order, provided that job openings at T.I.M.E.- DC terminals would first be offered to "those persons who may be found by the Court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964," and that after such individuals had been offered an opportunity to qualify for a line-driver (LD) vacancy T.I.M.E.- DC would fill future vacancies on a one-to-one (minority to white) hiring ratio until the terminal reached the minority-to-white ratio approximate to that of the city or metropolitan area in which the terminal was located.

The consent decree further provided for payment by T.I.M.E.- DC of $89,500.00 to the government for distribution to alleged discriminatees in amounts to be determined by the plaintiff's attorneys, not to exceed $1,500.00 to any one person. The consent decree left for trial the questions of whether there was in fact a pattern and practice of discrimination, and, if so, which, if any, employees were "individual or class discriminatees suffering the present effects of [such] past discrimination."

C

The District Court Order

After trial on the merits the District Court concluded on the basis of statistical evidence as well as certain "live" testimony that T.I.M.E.-DC had not hired minorities in proportion to their numbers in the various terminals, had not allowed minorities to engage in the choice jobs at the terminals such as line-driver and that the facially neutral union contracts had operated to impede the free transfer of minority groups. In short, the District Court concluded that the defendants had engaged in a pattern and practice of employment discrimination unlawful under Title VII, as alleged.

In determining what persons, if any, were discriminatees suffering the present effects of the unlawful discrimination and thus entitled to relief the Court asked the government to submit

a list of individuals for whom relief was sought. Such a list, entitled "Individuals for Whom Plaintiff Seeks Relief" was filed, categorizing into an "affected class" by terminal and job classification those incumbent employees for whom relief was sought. With one exception[8] the incumbents in question were blacks and SSA's assigned to city operation and serviceman jobs at T.I.M.E.- DC terminals that maintained a line-driver operation prior to 1969. Relief was thus sought with respect to only 20 of T.I.M.E.- DC's 51 terminals.[9]

The government asked the District Court to grant class and individual seniority relief to approximately 380 incumbent employees (of whom some 34 testified), asking that they be offered an opportunity to transfer to future vacancies in line-driver jobs (or other jobs from which they had been excluded) on the basis of their company seniority, which seniority they would take to the new job for all purposes, including bidding and lay off. The District Court found that while the incumbent minority employees in question were members of the "affected class" of discriminatees, not all of them were injured simply by being members of the class, and those who were injured were not all affected to the same degree. Consequently, the Court gave relief to employees within the class dependent upon the Court's view of the degree to which each was damaged by the employer's racial discrimination. This was done by dividing the members of the class into several groups:

Listed on Appendix A were 30 individuals who, according to the District Court, "have suffered severe injury because of the practice and plan of discrimination" by T.I.M.E.- DC and its predecessors. These individuals were given the right (unavailable to white employees) to transfer to road employment with seniority for bidding and lay-off purposes carried back to July 2, 1965 (the effective date of Title VII).

Four individuals were placed in the trial court's Appendix B, because the evidence was insufficient "to show clear and convincing specific instances of discrimination or harm resulting therefrom." These employees were given the opportunity to

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[8] A group of white employees at the Memphis terminal hired prior to the date the terminal ceased allowing city drivers to transfer to line-drivers.

[9] As recognized by the Court of Appeals at 517 F. 2d 299, 308; App. 12.

transfer to road jobs with seniority carried back to January 14, 1971 (the filing of the systemwide pattern and practice suit in the Northern District of Texas).

The remaining incumbents in the class were placed in Appendix C. While the Court indicated it had no evidence to show that these individuals were harmed by the discrimination to the class as a whole, they were nevertheless held entitled to road vacancies with seniority as of the date of future entry into the road unit. They therefore would have preference over the general public and over incumbent white city employees.

The District Court thus attempted to exercise its discretion and fashion a remedy consistent with the degree of injury suffered by the members of the affected class. In addition, the Court prescribed a number of conditions to guarantee that the employer would implement the provisions of the consent decree as well as the provisions of the Court's order. The relief granted was restricted to future vacancies, and a position was not to be considered vacant if there was a seniority roster employee on lay-off unless the lay-off had been in existence for at least three years. The Court also altered the Modified Seniority System of the Southern Area Conference and "specifically tailored relief to cover miscellaneous and unique circumstances at other terminals."[10] All parties appealed from the decision of the District Court.

D

The Court of Appeals' Opinion

On appeal the Court of Appeals affirmed the lower court's holding that the defendants had engaged in an unlawful pattern of employment practices, but rejected the trial court's gradations of relief as reflected by Appendices A, B and C. The Court held that the lower court had misconceived the purpose and procedural structure of a pattern and practice suit by requiring or permitting individualized proof of discrimination and injury. This approach, said the Court, would "defy reason and waste precious judicial resources," saying that "whatever evidentiary

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[10] 517 F. 2d 299, 309; App. 15.

hearings are required for individuals can well be postponed to the remedy." 517 F.2d 299, 319; App. 34.[11]

The Court of Appeals accordingly remanded the case for further evidentiary hearings, ordering the District Court to eliminate the distinctions prescribed for those in Appendices A, B and C, holding that "for all members of the class there should be full company employment seniority carry-over for bidding and lay-off purposes, subject. . . to the proper application of the qualification date principle."[12]

In addition to requiring the trial court on remand to eliminate the distinctions between members of the affected class as prescribed in Appendices A, B and C, the Court of Appeals states that there "may be need" for "an evidentiary exploration of the distinction between incumbents, former employees and applicants who were never hired."[13] Inasmuch as the government on appeal disclaimed "any attempt to seek review of the District Court's failure to grant individual relief to the rejected applicants or former employees in App. C,"[14] this suggests that on remand the District Court could grant relief beyond that sought by the government and beyond the scope of the issues before the Court of Appeals.[15]

In addition to ordering that there should be a new determination consistent with the Court's opinion as to relative relief for the various employees in the affected class, the Court of Appeals modified the District Court order in several other important respects. While acknowledging that the provision in the union contract granting laid off line-drivers a three year period in

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[11] The Court of Appeals apparently believed that the lower court had improperly received individualized proof of injury at the *liability* stage of the proceedings. This is evident from the Court's reference to postponement of evidentiary hearings "to the remedy" and from the Court's remark that, "For all we know, *at this stage* some on Appendix C may have suffered more egregious discrimination than those whom the government singled out to be persuasive witnesses to establish pattern and practice" (Emphasis supplied). In fact there was a full trial of *all* the issues before the District Court.

[12] 517 F. 2d 299, 321; App. 38.

[13] 517 F. 2d 299, 321; App. 38.

[14] 517 F. 2d 299, 317; App. 31.

[15] "The issue then is not really before us as to those applicants for jobs who were not incumbents." 517 F. 2d 299, 317; App. 31.

which to move into vacancies at their home terminal without competition was not adopted for discriminatory purposes, the Court held that this "would unduly impede the eradication of past discrimination" and consequently modified the decree to require laid off line-drivers to compete with members of the affected class for any vacancy "which is not a purely temporary one" at the terminal in question.[16] Nowhere in the Court's opinion is a "purely temporary" vacancy defined.

The Court also altered the Modified Seniority System of the Southern Area Conference. Under that system laid off line-drivers could compete for vacancies or bump junior line-drivers at other terminals within the Southern Conference.

As modified, a laid off LD in the Southern Conference may continue to bump junior LD's at other terminals, but may not move to another terminal where a vacancy exists and take priority over any affected class member. The laid off line-driver who bumps a junior driver at another terminal may exercise his right of recall when an opening occurs at his own terminal, but when an opening occurs at the terminal where the bump took place, members of the affected class may compete on the basis of seniority with the LD on lay-off who was bumped (or with any other LD on lay-off at that terminal). Finally, to "speed up the advancement of discriminatees into the LD position" members of the affected class in the Southern Conference may bid on LD openings at other terminals within the Conference in competition with employees at that terminal on the basis of employment seniority after all members of the affected class at that terminal have been given the opportunity to bid on the position.[17]

The Court thus remanded the case "for further evidentiary and judgmental proceedings," noting that the District Court should feel free to fully use special masters in view of the large numbers of people involved.[18]

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[16] 517 F. 2d 299, 322; App. 41.

[17] 517 F. 2d 299, 323; App. 42, 43.

[18] 517 F. 2d 299, 324; App. 44.

REASONS FOR GRANTING THE WRIT

This case presents questions of federal law of great importance not only to petitioner and the numerous other motor carriers similarly situated, but also to the thousands of persons of all race whom they employ. While Title VII cases of this nature have flourished in the federal courts, the cases have not resolved fundamental questions of proof and the allocation of proper seniority relief. The Fifth Circuit's application of the "rightful place" doctrine in the instant case is in direct conflict with that of the Sixth Circuit in *Thornton* v. *East Texas Motor Freight*, 497 F. 2d 416 (6th Cir. 1974). Under these circumstances the Court should exercise its powers of supervision to resolve the conflicts and uncertainties which now exist.

1.

As recognized by the Court of Appeals, the District Court's conclusion that the defendants had engaged in an unlawful pattern and practice of employment discrimination was in large part based upon 1971 statistics reflecting the racial composition of various job classifications. The Court of Appeals agreed that such statistics are not only significant, but may be "dispositive" and "decisive."[19] While the Court was able to cite a number of other cases where the same approach was followed, the instant case demonstrates the virtually insuperable burden such an approach places on the employer in a Title VII action.

As noted by the Circuit Court, T.I.M.E.-DC is a nationwide motor freight system which is the product of ten mergers over a 17-year period. The consent decree entered into by T.I.M.E.-DC and the government was directed at resolving the issues as to alleged hiring practices of the numerous companies which were merged into T.I.M.E.-DC. The Court of Appeals specifically recognized the company's progress under the consent decree:

> "T.I.M.E.-DC's recent minority hiring progress stands as a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment."[20]

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[19] 517 F. 2d 299, 313; App. 23.

[20] 517 F. 2d 299, 316; App. 27, 28.

Specific percentages are cited by the Court of Appeals to demonstrate the actual progress made by the employer in this respect. Significantly, T.I.M.E.-DC's progress was made during a period when total employment declined substantially.

Admittedly when the Civil Rights Act was passed in 1964, there was racial imbalance in the work force of T.I.M.E.-DC's predecessors, as there was in the trucking industry in general and indeed in the nation's work force in general. Under the approach of the Court of Appeals presumably every employer and union is engaged in an unlawful "pattern or practice" of resistance to the full enjoyment of the rights secured by Title VII until through preferential hiring or firing the employer can meet the Standard Metropolitan Statistical Area (SMSA) ratios.

The legislative history of the Act reflects that the intent of the legislation was not to require an employer to maintain a racial balance in his work force, but rather to end discrimination in hiring.[21] The Court of Appeals disregards this legislative purpose by concentrating not on T.I.M.E.-DC's post-Act hiring and job statistics, but rather on statistics reflecting incumbency ratios. As indicated, a pattern and practice of discrimination will *always* appear under this approach unless and until an employer can meet the Standard Metropolitan Statistical Area ratios (in spite of the numerous deficiencies in these statistics, as demonstrated through expert testimony at the trial).

Once the government introduces statistics which demonstrate that the racial balance of an employer's work force does not match SMSA ratios, there is little the employer can do to rebut the government's "prima facie" case. In the instant case T.I.M.E.-DC demonstrated deficiencies in both the statistical and testimonial evidence presented by the government. Furthermore, the company analyzed the various instances of alleged discrimination to demonstrate that the individuals in the class were not the victims of discrimination, applying the analytical steps delineated by this Court in *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973).

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[21] *See, e.g.*, 110 Cong. Rec. 7212-7215 (4/8/64); EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, pp. 2067-2071; 2150; 3040.

The response of the Court of Appeals was that the District Court "was not compelled to credit" the employer's contention that there were no openings or the applicants had not completed their applications properly, and that the trial court *at the liability stage*[22] "was not required to sustain" the defendants' attack as to the credibility, availability or qualification of individual discriminatees.[23]

Thus the defendants have the burden of rebutting a prima facie case based upon statistics, but evidently under the decision of the Court of Appeals the trial court may disregard the employer's evidence as to the qualification or availability of individual discriminatees or the lack of job openings. In short, the employer is precluded from carrying the burden of proof assigned by the Court once the statistical prima facie case is established. Such a result was not intended by the drafters of Title VII.[24]

2.

Once a District Court has found an unlawful pattern and practice of racial discrimination, what sort of seniority relief is proper? That question, which has produced conflicting results in the Circuit Courts of Appeal, is the central issue in this appeal.

The trial court attempted to fashion a remedy consistent with the degree of injury suffered by the members of the affected class. The Court thus recognized that not all members of the class were necessarily injured and therefore entitled to substantial seniority carryover simply because they were in the class.

The Court of Appeals not only rejected the specific relief awarded by the District Court, but also criticized the Court for even considering individualized proof of discrimination and injury. While this may have been partially the result of the Circuit Court's belief that only the issue of liability was before the District Court,[25] petitioner submits that the District Court was well within its discretion in awarding relief on the basis of the degree of injury suffered by individual members of the class.

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[22] See note 11, *supra*, p. 8.

[23] 517 F. 2d 299, 315; App. 26, 27.

[24] See note 21, *supra*, p. 11.

[25] See note 11, *supra*, p. 8.

The plenary equitable power vested in the district courts under Title VII to fashion appropriate remedies for employment discrimination has often been recognized.[26] The remedy fashioned by a district court in a pattern and practice case such as the instant one should not be upset unless the court has clearly abused its discretion.

In the instant case the Circuit Court rejected the District Court's remedy and thus necessarily found that the Court had abused its discretion. The asserted basis for overturning the lower court's remedy was that the seniority relief given was insufficient to give all members of the affected class their "rightful place" in the company's work force.

The "rightful place" theory is that minority employees who have been discriminated against in the past should be given the opportunity to take their "rightful place" when job openings develop. The Fifth Circuit enunciated this doctrine in *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F. 2d 980 (5th Cir. 1969), and subsequently followed it in *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441 (5th Cir. 1973). As the Court stated in *Bing*, "how much seniority a transferee deserves should be determined by the date he would have transferred but for his employer's discrimination." 485 F. 2d 441, 450. However, in *Bing* the Court did not require proof of a prior indication of a desire to transfer from the city to the road, but held that upon proof of a *present* wish for transfer, the employee should be awarded seniority carryover from the city to the road as of the date the individual possessed road qualifications.

In *Rodriguez* v. *East Texas Motor Freight*, 505 F. 2d 40, 64 (1974), pending on certiorari, the Fifth Circuit held that *all* minority employees are to be given full carryover seniority based not upon any showing of when the individual would have transferred absent discrimination, but upon "whether he desires to transfer now."

The Fifth Circuit has moved one step further in the instant case, rejecting the trial court's examination of individual situations and holding that *all* minority employees within the class are

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[26] See *e.g.*, *Pettway* v. *American Cast Iron Pipe Company*, 494 F. 2d 211, 243 (5th Cir. 1974); *Thornton* v. *East Texas Motor Freight*, 497 F. 2d 416 (6th Cir. 1974); *Sabala* v. *Western Gillete, Inc.*, 516 F. 2d 1251 (5th Cir. 1975)

entitled to full seniority carry-over for all purposes, irrespective of whether they were injured by discrimination. In so holding the Court acknowledges that its interpretation of the "rightful place" doctrine is in direct conflict with that of the Sixth Circuit in *Thornton* v. *East Texas Motor Freight*, 497 F. 2d 416 (6th Cir. 1974).

In *Thornton* the Sixth Circuit specifically approved the "rightful place" theory enunciated by the Fifth Circuit, but rejected the "qualification date" formulation which gives a putative transferee carryover seniority as of the date he had the experience necessary to qualify him for a road driving job. Instead, the Court affirmed the District Court's grant of seniority carryover dating from six months after the transferee requested transfer or filed a charge with the EEOC. In so holding the Court noted that the qualification date formulation of the Fifth Circuit in *Bing* was not a strict application of the "rightful place" theory, in that "an employee might have become qualified to be a road driver on a given date, but he may have had absolutely no desire on that date to become a road driver." This criticism was specifically acknowledged but rejected by the Fifth Circuit in *Rodriguez*[27] and in the instant case.[28]

Petitioner agrees that the Fifth Circuit's wholesale granting of seniority relief irrespective of proof of individual injury is not a correct application of the "rightful place" rule. Instead, it constitutes the sort of reverse discrimination deemed impermissible by those responsible for the passage of Title VII.[29]

3.

The Court of Appeals also erred, it is submitted, in refusing to apply the "analytical steps delineated by the recent case of *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792 (1973)" on the basis that the case "is inapplicable to a pattern and practice suit such as the one before us."[30]

While *McDonnell Douglas* obviously involved a different set of facts than the instant case, petitioner submits that the

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[27] 505 F. 2d 40, 64.

[28] 517 F. 2d 299, 318; App. 32.

[29] See EEOC, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, p. 3040.

[30] 517 F. 2d 299, 316; App. 27.

criteria enunciated therein are as applicable when the government seeks relief on behalf of a class as when an individual files a claim. The petitioner's attempt to apply the *McDonnell Douglas* criteria to the instances of alleged discrimination in the instant matter was rather summarily rejected by the Circuit Court. It is respectfully suggested that only through such an analysis is it possible to determine whether individual employees within an "affected class" were actually damaged by racial discrimination, and if so, what it will take to put each worker in the "rightful place" he would have enjoyed absent the discrimination.

4.

Finally, petitioner submits that the Court of Appeals erred in upsetting that portion of the Court's final order designed to protect laid off incumbents. Under the terms of the District Court order a vacancy was not deemed to exist until it continued for three years. A laid off employee on the seniority roster where an opening occurred would therefore have preference to fill a vacancy without competition from members of the "affected class" for a period of three years. While acknowledging that the contractual provision in question was not adopted for discriminatory purposes, the Circuit Court nevertheless modified the lower court's decree to eliminate the contractual protection given to laid off line-drivers. Thus, under the decision of the Court of Appeals, "when a vacancy which is not a purely temporary one arises in the LD position at a T.I.M.E.- DC terminal, any LD on lay-off at that terminal may compete against members of the affected class on the basis of full employment seniority."[31]

Similarly, to "speed up the advancement of discriminatees into the LD position" the Court ordered changes in the Modified Seniority System of the Southern Area Conference.[32] The effect of this alteration will be to diminish the seniority rights of incumbent line-drivers within the Southern Conference, as well as to create administrative nightmares for the company.

In altering valid contractual provisions to permit the acceleration of the advancement of members of the affected class to

[31] 517 F. 2d 299, 322-323; App. 41.

[32] See p. 9, *supra*.

the detriment of incumbent employees the Court would require the Company and the union to engage in reverse discrimination contrary to the purpose of Title VII.[33]

As reflected by Section 703 (h), Congress did not intend that Title VII be used to abolish non-discriminatory seniority provisions. Furthermore, the legislative history reflects an intent to require employers to fill future vacancies on a non-discriminatory basis, not to accelerate the progress of one group of employees at the expense of another.

While purporting to apply the "rightful place" doctrine, the Court of Appeals went far beyond not only in granting carryover seniority relief on a wholesale basis, but in invalidating existing seniority provisions to permit the accelerated progress of minority employees at the expense of other incumbents.

CONCLUSION

WHEREFORE, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

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[33] See notes 21 and 29, *supra*, pp. 11, 14.

Respectfully submitted,

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BRIEF FOR PETITIONER T.I.M.E.-DC, INC.

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Nos. 75-636 and 75-672

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-636

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

No. 75-672

T.I.M.E.-DC, INC.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

BRIEF FOR PETITIONER T.I.M.E.-DC, INC.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 517 F. 2d 299 and is reproduced in the Appendix to the Petition for Certiorari in No. 75-636 (Pet. A. 1).[1]

The pertinent District Court's preliminary opinions are reproduced in the Appendix to Petition for Certiorari in No. 75-636 as follows:

December 31, 1971, 335 F. Supp. 246; 4 F.E.P. Cases 77 (Pet. A. 45)

1. "Pet. A." refers to the Appendix to Petition for Certiorari in No. 75-636, while "A." refers to the Single Appendix.

January 20, 1972; 4 F.E.P. Cases 875 (Pet. A. 50)

October 19, 1972; 6 F.E.P. Cases 690 (Pet. A. 56)

December 6, 1972; 6 F.E.P. Cases 703 (Pet. A. 79)

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1975 (Pet. A. 1). A timely petition for a writ of certiorari was filed by the International Brotherhood of Teamsters ("IBT") in No. 75-636 on October 29, 1975, and by T.I.M.E.-DC, Inc. ("T.I.M.E.-DC") in No. 75-672 on November 6, 1975. On May 24, 1976, the Court granted and consolidated the two petitions. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent sections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.*, as amended, of primary importance to T.I.M.E.-DC's petition[2] are as follows:

Section 703(a), 42 U.S.C. Section 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(j), 42 U.S.C. Section 2000e-2(j):

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2. Additional relevant provisions of Title VII are set forth at Pet. A. 119-124.

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

QUESTIONS PRESENTED

1.

Are statistics reflecting a present disparity in the proportion of white versus minority incumbent employees "dispositive" in a pattern and practice suit under Section 703 of Title VII of the Civil Rights Act of 1964, where the Court of Appeals has found that the employer has made "a laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment"?

2.

In fashioning a remedy in a pattern and practice case does a District Court have discretion to award relief to individuals on the basis of the degree of injury suffered by each individual (as held by the District Court), or must all minority employees in the affected class be awarded relief, regardless of the injury suffered (as held by the Court of Appeals)?

3.

Are there different standards for determining individual relief under Tile VII of the Civil Rights Act of 1964, depending upon whether the suit is an individual or a class action, or a pattern and practice suit?

4.

Where a union contract provides that laid off employees have first call to reinstatement rights for a three-year period, may individual minority employees who have never been employed in such positions and who are not found to have been affected by racial discrimination be granted priority over laid off employees?

STATEMENT OF THE CASE

I.

The Facts

As stated by the Court of Appeals, "This governmental pattern and practice suit is one more in an ever-increasing number of Title VII employment discrimination cases arising out of the trucking industry and primarily involving the *past* exclusion of minority group members from the job of over-the-road line-drivers."[3] (Emphasis supplied). The Attorney General sued T.I.M.E.-DC, a transcontinental common motor carrier, and IBT under Section 707(a) of Title VII of the Civil Rights Act of 1964, as amended, alleging that the defendants were engaged in a pattern and practice of discrimination with respect to the employment of black and Spanish-surnamed American (SSA) persons.[4]

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3. 517 F. 2d 299, 302; Pet. A. 1, 2.

4. Two separate suits were brought and ultimately consolidated for trial, the first alleging a pattern and practice of discrimination at the employer's Nashville terminal, the second charging T.I.M.E.-DC and IBT with engaging in a pattern and practice of discrimination on a systemwide basis.

The essence of the government's claims was that T.I.M.E.-DC and its predecessors[5] had discriminated by assigning blacks and SSAs to lower paying and less desirable job classifications while reserving for whites the higher paying and more desirable classifications, by refusing to promote or transfer minority employees to more desirable positions and by maintaining a system of promotions and transfers which perpetuated the effects of the company's past discrimination. It was also the claim of the government that IBT (by itself and through its Area Conferences and Locals) had engaged in a pattern and practice of discrimination by entering into contracts which tended to perpetuate the effects of the employer's past discrimination by impeding the transfer of blacks and SSAs to more desirable jobs.

The contractual provisions in question are neutral on their face and do not prohibit employees from transferring from one classification to another. Nor did the company have any policy prohibiting employees from transferring from one unit to another.[6] When they do, they retain their full *company* seniority, which is measured from date of hire and is utilized to compute fringe benefits such as vacations, pensions and holidays. However, a transferring employee acquires new *unit* seniority as of the date of entry into the new unit which "establishes his seniority for purposes of bidding and lay-off in the job he transfers to."[7]

The government contended that the facially neutral contract provisions operated "to impede the free transfer of minority groups," because a transferring employee could not carry over his seniority from one classification (unit) to another

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5. T.I.M.E.-DC, a nationwide motor freight system, is a product of no less than ten mergers over a 17-year period. The company's merger history is set forth in the Opinion of the Court of Appeals at 517 F. 2d 299, 304; Pet. A. 5.

6. With the exception of the Memphis terminal for the period of 1958 through 1968, during which time city drivers were not permitted to transfer to line-driver positions. In December of 1968 the company adopted a policy at Memphis of offering vacancies in line-driver jobs to qualified city employees before filling the jobs with persons "off the street." 517 F. 2d 299, 313; Pet. A. 22.

7. Pre-trial Order ¶ 3 (15), A. 48.

for lay-off and bid purposes. The government admittedly did not allege "that the bargaining units were established for the purpose of discrimination on the basis of race or national origin."[8]

II.

The Consent Decree

During the course of the trial in the District Court the government and T.I.M.E.-DC entered into a consent decree[9] which "resolved those issues relating to T.I.M.E.-DC's alleged practice of hiring discrimination and its resulting obligation to affirmatively recruit and hire qualified Blacks and Spanish-surnamed Americans as new employees, and its alleged obligation to provide monetary compensation for those blacks and Spanish-surnamed Americans whom the United States alleged were individual and class victims of past discrimination."[10]

In entering the consent decree the District Court specifically indicated that the decree did "not constitute an adjudication or finding on the merits of the case", nor was it to "be construed as an admission by T.I.M.E.-DC of any violation of Title VII."[11]

The consent decree, a portion of which was expressly adopted by the District Court in its final order, provided that job openings at T.I.M.E.-DC terminals would first be offered to "those persons who may be found by the Court, if any, to be individual or class discriminatees suffering the present effects of past discrimination because of race or national origin prohibited by Title VII of the Civil Rights Act of 1964," and that after such individuals had been offered an opportunity to qualify for a line-driver (LD) vacancy T.I.M.E.-DC would fill future vacancies on a one-to-one (minority to white) hiring ratio until

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8. Pre-trial Order ¶ 3 (17), A. 49.

9. "Decree in Partial Resolution of Suit"; Pet. A. 85.

10. Government's Brief to the Court of Appeals, pages 4-5.

11. Pet. A. 86.

the terminal reached the minority percentage equal to that of the city or metropolitan area in which the terminal was located.[12]

The consent decree further provided for payment by T.I.M.E.-DC of $89,500.00 to the government for distribution to alleged discriminatees in amounts to be determined by the plaintiff's attorneys, not to exceed $1,500.00 to any one person. The consent decree thus left for trial the questions of whether there was in fact a pattern and practice of discrimination, and, if so, which, (if any) employees were "individual or class discriminatees suffering the present effects of [such] past discrimination." In entering the Court decree the Court also noted that it retained jurisdiction "for such further relief or other orders as may be appropriate."

III.

The District Court Order

As indicated above, the consent decree was entered into during the course of the trial in May of 1972. All parties introduced live testimony and the government introduced a number of depositions and summaries of depositions. The District Court concluded on the basis of the government's statistical and other evidence that T.I.M.E.-DC had not hired minorities in proportion to their numbers in the various terminals, had not allowed minorities to engage in the "choice" jobs in the terminal (such as line-driver) and that the facially neutral union contracts had operated to impede the free transfer of minority groups. In short, the District Court concluded that the defendants had engaged in a pattern and practice of employment discrimination unlawful under Title VII.

In determining what persons, if any, were discriminatees suffering the present effects of the unlawful discrimination and thus entitled to relief the Court asked the government to submit a list of individuals for whom relief was sought. Such a list[13] was filed, categorizing into an "affected class" by terminal and job classification those incumbent employees for whom relief was

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12. Decree in Partial Resolution of Suit, ¶ 13; Pet. A. 90-91.

13. "Individuals For Whom Plaintiff Seeks Relief"; A. 191-224.

sought. With one exception[14] the incumbents in question were blacks and SSAs assigned to city operation and serviceman jobs at T.I.M.E.-DC terminals that maintained a line-driver operation prior to 1969. Relief was thus sought with respect to 20 of T.I.M.E.-DC's 51 terminals.[15]

The government asked the District Court to grant class and individual seniority relief to approximately 380 incumbent employees (of whom some 34 individuals sprinkled throughout the classes testified). The government asked that all members in the class be offered an opportunity to transfer to future vacancies in line-driver jobs (or other jobs from which they had been excluded) on the basis of their company seniority, which they would take to their new jobs for all purposes, including bidding and lay-off.

The District Court found that while the incumbent minority employees in question were members of the "affected class" of discriminatees, not all of them were injured simply by being members of the class, and those who were injured were not all affected to the same degree. Consequently, the Court gave relief to employees within the class dependent upon the Court's view of the degree to which each was damaged by the employer's racial discrimination.[16]

Listed on Appendix A were 30 individuals who, according to the District Court, "have suffered severe injury because of the practice and plan of discrimination" by T.I.M.E.-DC and its predecessors. These individuals were given the right (unavailable to white employees) to transfer to road employment with seniority for bidding and lay-off purposes carried back to July 2, 1965 (the effective date of Title VII).

Four individuals were placed in the trial court's Appendix B, because the evidence was insufficient "to show clear and convincing specific instances of discrimination or harm resulting

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14. A group of white employees at the Memphis terminal hired before the terminal ceased allowing a few city drivers to transfer to line drivers.

15. As recognized by the Court of Appeals at 517 F. 2d 299, 308; Pet. A. 12.

16. See trial court's "Final Order." Pet. A. 94, 100 ff.

therefrom." These employees were given the opportunity to transfer to road jobs with seniority carried back to January 14, 1971 (the date of filing of the systemwide pattern or practice suit in the Northern District of Texas).

The remaining incumbents in the class were placed in Appendix C. While the Court indicated it had no evidence to show that these individuals were harmed by the discrimination to the class as a whole, they were nevertheless held entitled to road vacancies with seniority as of the date of future entry into the road unit. They therefore would have preference over the general public and over incumbent white city employees.

The District Court thus attempted to exercise its discretion and fashion a remedy consistent with the degree of injury suffered by the members of the affected class. In addition, the Court prescribed a number of conditions to guarantee that the employer would implement the provisions of the consent decree as well as the provisions of the Court's order. The relief granted was restricted to future vacancies, and a position was not to be considered vacant if there was a seniority roster employee on lay-off unless the lay-off had been in existence for at least three years. The Court also altered the Modified Seniority System of the Southern Area Conference and "specifically tailored relief to cover miscellaneous and unique circumstances at other terminals."[17] All parties appealed from the decision of the District Court.

IV.

The Court of Appeals Opinion

On appeal the Court of Appeals affirmed the lower court's holding that the defendants had engaged in an unlawful pattern of employment practices, but rejected the trial court's gradations of relief as reflected by Appendices A, B and C. The Court held that the lower court had misconceived the purpose and procedural structure of a pattern and practice suit by requiring or permitting individualized proof of discrimination

17. Pet. A. 15.

and injury. This approach, said the Court, would "defy reason and waste precious judicial resources," saying that "whatever evidentiary hearings are required for individuals can well be postponed to the remedy."[18]

The Court of Appeals accordingly remanded the case for further evidentiary hearings, ordering the District Court to eliminate the distinctions prescribed for those in Appendices A, B and C and holding that "for all members of the class there should be full company employment seniority carry-over for bidding and lay-off purposes, subject . . . to the proper application of the qualification date principle."[19]

In addition to requiring the trial court on remand to eliminate the distinctions between members of the affected class as prescribed in Appendices A, B and C, the Court of Appeals indicated that there might be need for "an evidentiary exploration of the distinction between incumbents, former employees and applicants who were never hired."[20] Inasmuch as the government on appeal disclaimed "any attempt to seek review of the District Court's failure to grant individual relief to the rejected applicants or former employees in App. C,"[21] the Court of Appeals opinion thus raises the possibility that on remand the District Court could grant relief beyond that sought by the government and beyond the scope of the issues before the Court of Appeals.[22]

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18. 517 F. 2d 299, 319; Pet. A. 34. From the Court's reference to postponement of evidentiary hearings "to the remedy" it is evident the Court of Appeals believed that the lower court had improperly received individualized proof of injury at the *liability* stage of a bifurcated proceeding. This is also apparent from the Court's remark that, "for all we know, *at this stage* some on Appendix C may have suffered more egregious discrimination than those whom the government singled out to be persuasive witnesses to establish pattern and practice." (Emphasis supplied). In fact there was a full trial of *all* the issues before the District Court, involving *remedy* as well as *liability*.

19. 517 F. 2d 299, 321; Pet. A. 38.

20. *Id.*

21. 517 F. 2d 299, 317; Pet. A. 31.

22. "The issue then is not really before us as to those applicants for jobs who were not incumbents." 517 F. 2d 299, 317; Pet. A. 31.

The Court of Appeals also modified the District Court order in several other important respects. While acknowledging that the provision in the union contract granting laid off line-drivers a three year period in which to move into vacancies at their home terminal without competition was not adopted for discriminatory purposes, the Court held that this "would unduly impede the eradication of past discrimination" and consequently modified the decree to require laid off line-drivers to compete with members of the affected class for any vacancy " which is not a purely temporary one" at the terminal in question."[23]

The Circuit Court also altered the Modified Seniority System of the Southern Area Conference. Under that system laid off line-drivers could compete for vacancies or bump junior line-drivers at other terminals within the Southern Conference. As modified, a laid off LD in the Southern Conference may continue to bump junior LDs at other terminals, but may not move to another terminal where a vacancy exists and take priority over any affected class member. The laid off line-driver who bumps a junior driver at another terminal may exercise his right of recall when an opening occurs at his own terminal, but when an opening occurs at the terminal where the bump took place, members of the affected class may compete on the basis of seniority with the LD on lay-off who was bumped (or with any other LD on lay-off at that terminal).

Finally, to "speed up the advancement of discriminatees into the LD position" members of the affected class in the Southern Conference may bid on LD openings at other terminals within the Conference in competition with employees at that terminal on the basis of employment seniority after all members of the affected class at that terminal have been given the opportunity to bid on the position.[24]

The Court thus remanded the case "for futher evidentiary and judgmental proceedings," noting that the District Court should feel free to fully use special masters in view of the large numbers of people involved.[25]

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23. 517 F. 2d 299, 322; Pet. A. 41. A "purely temporary" vacancy is not defined in the Opinion.

24. 517 F. 2d 299, 323; Pet. A. 42, 43.

25. *Id.* at 324; Pet. A. 44.

SUMMARY OF ARGUMENT

I.

Incumbency statistics alone should not be held conclusive in establishing a pattern or practice of employment discrimination at various terminals of a transcontinental motor carrier. It is evident both from the language of Title VII and from its legislative history that it was not intended to require an employer to achieve a racial balance in his work force, but rather to end discrimination in hiring. This Court, while recognizing that statistics may reflect discrimination, has continued to maintain that a complaining party or class must make out a prima facie case of discrimination and has never held that demographic statistics alone are conclusive.

Under the decision of the Court of Appeals the failure of T.I.M.E.-DC to move from an admitted racial imbalance in 1964 to a complete racial balance in 1971 was of *decisive* significance, despite the company's acknowledged "laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment." Ample evidence of the company's progress was introduced at the trial, as well as evidence establishing the deficiencies in the government's bare statistics. The company similarly demonstrated that the government's witnesses were not the victims of individual or class discrimination. Under these circumstances the trial court's findings of individual discrimination were erroneous, let alone the holding that the government established an unlawful pattern or practice of employment discrimination.

II.

Assuming *arguendo* that the District Court properly found that petitioner had engaged in an unlawful pattern or practice of employment discrimination, in exercising its equitable jurisdiction at the conclusion of a full trial on the merits the Court was entitled to grant seniority relief on the basis of the extent of injury suffered by the individual employees in question. Apparently believing that only the issue of liability was tried in the District Court, the Court of Appeals erred in rejecting the

District Court's remedy and ordering that all members of the affected class were entitled to full seniority carry-over for all purposes, irrespective of whether they were actually injured by discrimination. The Circuit Court's decision did not represent a proper application of the "rightful place" doctrine and would require the parties to retry issues already full litigated.

III.

Whether an action is brought by an individual for himself or on behalf of a class of individuals, or by the government on behalf of a class, the critical questions are the same: Was there unlawful racial discrimination, was the individual damaged thereby and, if so, what will it take to put him in his "rightful place" in the work force? Contrary to the holding of the Fifth Circuit, the criteria announced by this Court in *McDonnell Douglas Corporation* v *Green*, 411 U.S. 792 (1973), are relevant in answering these crucial questions. The Court of Appeals erred in summarily rejecting petitioner's efforts to apply the *McDonnell Douglas* criteria to the evidence below.

IV.

The Court of Appeals erred in upsetting that portion of the District Court's final order designed to protect laid off incumbents, thus invalidating a contractual provision which admittedly was not adopted for discriminatory purposes. Under the decision of the Circuit Court, members of the affected class may compete with laid off line-drivers for any vacancy "which is not a purely temporary one." This ambiguous requirement would be impossible to enforce without further definition, would cause administrative difficulties for the company and would require the company to engage in reverse discrimination contrary to the legislative intent of Title VII.

ARGUMENT

I.

STATISTICS REFLECTING A PRESENT DISPARITY IN THE PROPORTION OF WHITE VERSUS MINORITY INCUMBENT EMPLOYEES SHOULD NOT BE HELD "DISPOSITIVE" IN PROVING A PATTERN OR PRACTICE OF EMPLOYMENT DISCRIMINATION.

As recognized by the Court of Appeals, the District Court's conclusion that the defendants had engaged in an unlawful pattern and practice of employment discrimination in large part was based upon 1971 statistics reflecting the racial composition of various job classifications. The Court of Appeals agreed that such statistics are not only significant, but may be "dispositive" and "decisive."[26] In support of this proposition the Court of Appeals cited a number of cases, many of which were decisions of the Fifth Circuit itself.[27] The Circuit Court indicated that "for this very industry and employment practices" the holding in the cited cases "eliminates all doubts of the decisive significance of flagrant statistical deviations."[28]

It is evident from its own terms, as well as from its legislative history, that Title VII was not intended to require an employer to achieve a racial balance in his work force, but rather to end discrimination in hiring. This could hardly have been set forth more clearly than in Section 703(j) of the Act, which provides as follows in relevant part:

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26. 517 F. 2d 299, 313; Pet. A. 23.

27. Including *United States* v *Hayes International Corp.*, 456 F. 2d 112, 120 (5th Cir. 1972), where the Court held that "The inference [of discrimination] arises from the statistics themselves and no other evidence is required to support the inference" and *Rodriguez* v *East Texas Motor Freight*, 505 F. 2d 40, 53 (5th Cir. 1974), where the Court stated that "a prima facie case of discrimination may be established by statistical evidence, and statistical evidence alone." *Rodriguez* is now pending in this Court, petitions for certiorari having been granted and consolidated in Nos. 75-651, 75-715 and 75-718.

28. 517 F. 2d 299, 313; Pet. A. 23. Other courts have disagreed that statistics alone are conclusive. *E.g.*, *Senter* v *General Motors Corp.*, 532 F. 2d 511, 527 (6th Cir. 1976), where the Court noted that statistical evidence, while quite revealing, was "not conclusive" in the Sixth Circuit. The Court acknowledged (in note 42), that "Other courts have held that statistics alone may be sufficient to establish a prima facie case of discrimination," citing several decisions from the Fifth Circuit and one from the Eighth.

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of such race . . . in any community . . . ."

In explaining the purpose of this provision, Senator Humphrey, one of the supporters of the legislation, stated that the section was added to state clearly and accurately what the proponents of the Bill had carefully stated on numerous occasions, "That Title VII does not require an employer to achieve any sort of racial balance in its work force by giving preferential treatment to any individual or group."[29]

As reflected by Senator Humphrey's statement, during the legislative deb[illegible] there had been persisting doubts that the real purpose of Title VII was not merely to end discrimination, but to achieve racial balance.[30] In response to this suggestion Senators Clark and Case, floor managers of the Bill in the Senate, issued an interpretative memorandum saying the following:

> "There is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would invoke a violation of Title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race . . . ."[31]

Title VII thus was enacted upon assurances by sponsors of the Bill that the legislation was not intended to require an employer to maintain a racial balance in his work force. That a

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29. EEOC, Legislative History of Title VII and XI of the Civil Rights Act of 1964, 3005.

30. See EEOC Legislative History of Title VII and XI of the Civil Rights Act of 1964, 2067-68.

31. EEOC, Legislative History of Title VII and XI of the Civil Rights Act of 1964, 3040.

racial imbalance without proof of discriminatory treatment provides no basis for relief under Title VII was recognized by this Court in *Griggs* v *Duke Power Company*, 401 U.S. 424, 430-31 (1971):

> "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."

In subsequent decisions the Court has touched on the use of statistics as evidence of unlawful discrimination, but has not directly considered the use of demographic statistics to prove employment discrimination. In *McDonnell Douglas Corporation* v *Green*, 411 U.S. 792, 805 (1973), the Court noted that "Satistics as to petitioner's employment policy and practice may be *helpful* to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern or discrimination against blacks." (Emphasis supplied). The Court said that the District Court might, for example, "determine, after reasonable discovery that 'the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices.'" However, the Court added the following *caveat:*

> "We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire."

In *Albemarle Paper Company* v *Moody*, 422 U.S. 405, 95 S. Ct. 2362, 2375 (1975), the Court reiterated that the complaining party or class must make out a prima facie case of discrimination, citing *McDonnell Douglas, supra,* but did not spell out what is sufficient to establish such a case.

Again in the recent case of *Franks* v *Bowman Transportation Co., Inc.*,____ U.S. ____, 96 S Ct. 1251, 1268 (1976), reference is made to the plaintiffs' initial burden "of demonstrating the existence of a discriminatory hiring pattern and prac-

tice." While the Opinion discusses the sort of evidence respondents may introduce once the plaintiffs have carried their burden, there is no analysis of the quality or quantity of evidence necessary for plaintiffs to sustain this initial burden.

Under the approach of the Fifth Circuit, the plaintiff in a class action can establish a prima facie case that an employer has engaged in a pattern or practice of employment discrimination throughout its system by simply introducing statistics reflecting a racial imbalance in various job classifications. Admittedly when the Civil Rights Act was passed in 1964, there was a racial imbalance in the work force of T.I.M.E.-DC's predecessors, as there was elsewhere in the trucking industry and indeed throughout the nation's work force. Under the Fifth Circuit's simplistic approach presumably every employer is engaged in an unlawful "pattern or practice" of resistance to the full enjoyment of the rights secured by Title VII until through preferential hiring or firing the employer can meet the standard metropolitan statistical area (SMSA) ratios.[32]

The evidence reflecting T.I.M.E.-DC's progress in the area of equal employment (despite a substantial decline in the company's total work force) was ample. While total employment dropped from 7,238 employees in 1967 to 6,424 in 1972 (a decrease of 11.2%), the number of minorities increased from 512 to 677 in the same years (an increase of 32.2%).[33] Similarly, at the ten terminals regarding which plaintiff took depositions, total employees declined by 12% during this period, while the percentage of minority employees increased 20.6%.[34]

Systemwide, minorities went from 7.1% of the work force in 1967 to 10.5% in 1972,[35] and in 1972 16.5% of the city and

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32. As illustrated by the instant case, this is so even if the employer has made a "laudable good faith effort to eradicate the effects of past discrimination in the area of hiring and initial assignment," as found by the Circuit Court below.

33. During this six-year period the number of black employees increased by 45.3%, Exhibit TT; A. 899.

34. At these terminals the percentage of *blacks* increased to 28.5% of the work force. Exhibit UU; A. 905.

35. Exhibit CCC; A. 974.

dock employees were minorities.[36] As a result of T.I.M.E.-DC's campaign to hire minorities, in 1971 16.9% of all new hires in the system were minorities and 23.1% of the total hires in the western portion of the system. Significantly, 18.3% of the newly hired road drivers in the west were minorities.[37] The dramatic improvement continued after the trial in the District Court.[38] These statistics, it is submitted, reflect that T.I.M.E.-DC clearly has broken whatever old patterns of discriminatory employment practices existed.

Contrasted with these statistics were the raw statistics of the government. The thrust of these "proofs" was that T.I.M.E.-DC employed a lesser percentage of minorities in the jobs of line-driver and mechanic than the percentage of minorities in the communities where T.I.M.E.-DC maintained terminals, according to standard metropolitan statistical area (SMSA) and "urban places" statistics. The government was unable to show the precise area embraced by the SMSA or urban place surrounding any given city, nor did it have any way of relating how close the minority community generally was to the location of the T.I.M.E.-DC terminals,[39] what type of transportation was available from the minority community to the terminals, nor what portion of the minority community would be suited by age and health to perform the type of operations involved in the trucking business. Nor did the government's statistics consider any governmental, employer or industry job

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36. Exhibit VV; A. 910.

37. Exhibit WW; A. 916.

38. As noted by the Court of Appeals, 72 of the 113 new hires in the first half of 1973 were minorities, a total of 64% of all employees hired. Of the 95 line drivers hired in the first six months of 1973, 29 (over 30%) were minorities. 517 F. 2d at 316, note 31; Pet. A. 28. During the first quarter of 1976 minority employees constituted 15.6% of the company's total work force, according to the Quarterly Report recently filed with the District Court under the terms of the Consent Decree.

39. Commentators have suggested that such factors should be considered in determining whether a discriminatory pattern properly may be inferred from statistics showing a disparity between the work force and the general population: "[T]he inference [of a discriminatory pattern] is false if, for example, the measured geographical area does not coincide with the relevant labor market." Note, Employment Discrimination: Statistics and Preferences Under Title VII, 59 Va. L. Rev. 463, 469 (1973).

qualifications, nor were the exhibits supported by the underlying documents.[40]

The government also relied upon statistics to show that supervisory, line-driver and mechanics jobs were more desirable because they were higher paying. However, the company's statistics reflected that the supervisory personnel receive an *effective* hourly rate generally *below* that of union personnel, that mechanics receive an insignificant amount more per hour than servicemen, and that there is no clear pattern as to whether city drivers make less than line-drivers on a regular predictable basis, the earnings in all categories depending upon the volume of business, the hours worked and the working efforts of each individual employee.[41]

At the trial T.I.M.E.-DC demonstrated the numerous deficiencies in the government's statistics through the expert testimony of Professor Clay George.[42] Professor George, who has an extensive background in psychology, motivational characteristics of ethnic and racial groups, and statistics, reviewed the government's statistical evidence and concluded that the numerical data available was not sufficient to justify the conclusions reached by the government. Professor George testified that the statistics were unreliable at locations with a small number of individuals and that Spanish-surnamed Americans were included with whites in the SMSA statistics.[43] He also demonstrated that the statistics were unreliable by reason of their failure to take into account a number of factors which affect the percentage of minorities available as candidates for employment.[44]

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40. Testimony of Catherine McGinn, transcript 45-82; A. 299-319.

41. Exhibits KKK; MMM; PPP; Plaintiff's Exhibit 231; Testimony of Charles F. Hutchinson, transcript pages 700-703; A. 980, 986, 987, 898, 609-12, respectively.

42. Professor of Psychology, Texas Tech. University. A. 541.

43. George testimony; transcript 593, 594; A. 548-50.

44. For example, minority families have more children in a lower median age than whites and accordingly there is a smaller percentage of minorities available as part of the working force than whites. Exhibit BBB, Tables 1-4; A. 964.

Other relevant factors not reflected in the statistics include the greater reluctance of blacks to move from place to place, motivational factors (achievement and competitiveness), greater health problems and higher death rates in the case of minorities and a lower socio-economic status that is attributable to a culture of poverty among many minority persons. All of these factors make it difficult to predict statistically what part of the Negro community in any particular area would be available as candidates for employment.[45]

The Court of Appeals rejected T.I.M.E.-DC's attack on the government's statistical evidence[46] and pointed to the fact that the government buttressed its statistical evidence with a "massive" amount of testimony presented by live witnesses and by depositions taken at ten of the T.I.M.E.-DC terminals.

A review of this testimony reflects that it involved situations which petitioner submits were too isolated in number and in time to serve as a basis for a finding of a systemwide pattern or practice of discrimination. Thus, of the 379 persons for whom the plaintiff sought class and individual relief at various terminals, some 34 individuals testified, and the witnesses who testified regarding alleged class discrimination were generally concentrated in a few locations.[47]

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45. Testimony of George, transcript pages 594-615; A. 550-64.

46. The Fifth Circuit appears to believe that a pattern of racial discrimination has been conclusively established in the trucking industry. Citing *Rodriguez* and its companion cases (see Footnote 27, supra) the Court stated below that the holding there "for this very industry and employment practices eliminates all doubt of the decisive significance of flagrant statistical deviations." 519 F. 2d 299, 313; Pet. A. 23. In *Rodriguez* the Court discussed the large number of suits brought in Federal court alleging hiring discrimination in the trucking industry and concluded that "a clear pattern has emerged." Furthermore, to support its conclusion that the statistics in *Rodriguez* established a prima facie case of past discrimination in hiring, the Court there relied upon statistics in *other* cases which the Court said involved similar employment situations. 505 F. 2d 40, 53-54.

47. For example, seven alleged class members out of an alleged class of 44 at Memphis testified, 4 of 17 from Atlanta, 6 of 16 from Nashville, 4 of 43 at Montebello, California, and 4 of 129 at Vernon, California. These five (of 20 road terminals where relief was sought) accounted for 25 of the 34 witnesses who testified as to alleged classes of discriminatees.

For the majority of the terminals where the government sought to create classes for relief there were absolutely no witnesses who testified as to alleged discrimination at those terminals.[48] Furthermore, much of the government's testimony related to alleged acts of discrimination by T.I.M.E.-DC's predecessors long before Title VII became effective in July of 1965.[49]

In short, T.I.M.E.-DC submits that the statistics and individual testimony offered by the government were insufficient to establish a systemwide pattern or practice of employment discrimination in view of the counter-statistics of the company reflecting increased minority utilization in the face of decreasing personnel needs, the well established company policy of utilizing the best qualified applicant[50] and the absence of a no transfer policy.[51]

The government also asked the District Court to find that 20 of those who testified were individual discriminatees. T.I.M.E.-DC analyzed each instance of alleged discrimination to demonstrate that the individuals were not the victims of unlawful discrimination under this Court's analysis in *McDonnell Douglas, supra*[52].

48. Thus there was no testimony at 11 of the 20 terminals where the government sought relief, including San Antonio, Lubbock, Phoenix, Chattanooga, Paris, Cincinnati, Kansas City, Knoxville, Portland, St. Louis and Seattle.

49. For example, the claim for class relief at Memphis primarily grew out of several incidents occurring in 1956 to 1958, never occurring again at that terminal. Similarly, the claim for class relief at Atlanta grew out of basically two isolated events before the effective date of the Act. The Los Angeles terminals similarly involved mostly pre-Act incidents. A. 215-19; 211-12; 201-09.

50. See summary of Stroud dep. of 6/15/71, Atlanta, p. 9; Nagle dep. of 9/28/71, Los Angeles, pp. 13-17; testimony of Roy Wilkins, transcript 467; A. 104; 475-76, respectively.

51. See discussion at page 5 and in note 6, *supra*.

52. There this Court held: "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

In response the District Court found that some *30* employees were individual discriminatees (plus four persons falling into a "gray area"), only six of whom were included on the government's list of individual discriminatees.

On appeal T.I.M.E.-DC attacked the District Court's findings as "clearly erroneous" and analyzed the 48 persons who were either listed by the government as individual discriminatees or found by the District Court to be discriminatees. It was shown that *every one* failed to meet the standards of *McDonnell Douglas* in one or more particulars by reason of failure to apply for the job desired, the lack of an opening at the time of application, lack of equal qualification with the next hires in the category in question or, in many instances, for failure of any proof with respect to these critical questions.

Inasmuch as the court below flatly refused to consider the application of the *McDonnell Douglas* criteria, it seems unnecessary here to repeat the rather detailed analysis made by petitioner below. However, several examples should illustrate typical deficiencies in the government's evidence in proving either individual discrimination or a systemwide pattern or practice of employment discrimination.

One of the few individuals regarded by both the government and the District Court as entitled to individual relief was Richard Stinson, a black who alleged that he had made an oral application for a line-driver job with Los Angeles Seattle Motor Express (LASME, one of the several predecessors of T.I.M.E.-DC) at its Hayward (San Francisco) terminal in about March of 1969.[53] Stinson was not listed by the government as an alleged individual discriminatee on its list of April 1, 1971 and was not deposed at San Francisco, but did testify at the trial of the case in Lubbock, Texas. In March of 1969, when Stinson said he inquired about the line-driver's job, there were no road driver openings. This was reflected by plaintiff's Exhibit 6, the terminal seniority roster of December 30, 1970, which reflected that there were no road driver hires at the terminal between February of 1969 and November of 1969. Plaintiff produced no

53. Plaintiff's Proposed Findings of Fact, page 7.

evidence as to whether T.I.M.E.-DC continued seeking applicants after Stinson was not hired, nor whether Stinson was as qualified as the next hire.

Stinson testified that he also applied for a line-driver job with the company in 1971 by sending a letter[54] stating conclusions as to his qualifications, but that he refused to fill out the company's required application form on the basis that his letter constituted a sufficient application.[55] In any event there were no jobs open at the time, and no line-drivers were subsequently hired at Hayward (after September 4, 1970).[56]

Another individual found by the Court to be an individual discriminatee was Edgar C. Rudison, a black employed as a city driver with the company in Los Angeles since 1950. Although Rudison claimed to have asked officials (including the terminal manager) at TIME Freight (another T.I.M.E.-DC predecessor) for a line-driver job, he further stated that he had not applied for a line-driver job at T.I.M.E.-DC or any of its predecessors. [57] Inasmuch as Rudison never actually applied for the job of line-driver, it was impossible to apply the remaining *McDonnell Douglas* criteria. However, the record did reflect that Rudison had a series of chargeable accidents while employed as a city driver at T.I.M.E.-DC or its predecessors,[58] thus creating doubts as to Rudison's qualifications.

Another individual found by the Court entitled to relief as an individual discriminatee was Jose R. Almaraz, a Spanish-surnamed American city driver employed at the company's Montebello (Los Angeles) terminal. Like Rudison, Almaraz never applied to transfer from city driver to line-driver. Indeed, the evidence was that Almaraz actually *refused* the opportunity to work as a line-driver in a sleeper cab operation in 1968 or

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54. Exhibit OOO; testimony of James W. Frazier, transcript page 635-36, A. 566.

55. Testimony of Frazier transcript page 638, A. 568.

56. Testimony of Frazier, tranxcript page 641, A. 570.

57. Rudison deposition, pages 1-11.

58. Defendant's Exhibit M.

1969.[59] Nevertheless, the District Court found that Almaraz was among the individual discriminatees entitled to seniority relief.

A similar situation was that of John Passi, a Polynesian employed as a city driver with the company in Los Angeles since 1965. Passi asked Anthony W. Lillywhite, driver supervisor at the Los Angeles terminal, for extra line work on weekends, but never asked for a full-time line-driver position and never actually filed an application for a regular line-driving job with either LASME or T.I.M.E.-DC.[60]

One of the individuals claimed by the government to be representative of a class at Nashville was Lee Jones, a black service man for Super Service (another predecessor company) and T.I.M.E.-DC since 1952. The government did not allege or prove that Jones desired or asked for any other job.[61] Nevertheless, the District Court found that Jones was an individual discriminatee entitled to seniority relief.

As indicated above, in the Court of Appeals petitioner analyzed the evidence with respect to *all* of the persons either claimed by the government or found by the District Court to be individual victims of discrimination. The response of the Court of Appeals was that the District Court "was not compelled to credit" the employer's contention that there were no openings or that the applicants had not completed their applications properly, that the trial court at the liability stage[62] "was not required to sustain" the defendants' attack as to the credibility, availability or qualification of individual discriminatees, and that *McDonnell Douglas* was "inapplicable to a pattern and practice suit.[63]

While the Court's holding that the trial court should have disregarded the employer's evidence as to the qualification or availability of individual discriminatees, or the lack of job open-

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59. Almaraz deposition, pages 15-16; Lillywhite deposition of 9/28/71, pages 7-8, 11-12.

60. Deposition of Passi, page 7; deposition of Anthony Lillywhite of 9/28/71, page 9.

61. United States Proposed Findings of Fact, page 42.

62. See note 18, *supra*.

63. 517 F. 2d 299, 316; Pet. A. 27.

ings, may have resulted from the mistaken belief that the trial in the District Court involved only the question of liability, the result of the holding below is clear: The government in a pattern and practice case in the Fifth Circuit can establish a prima facie case based upon incumbency statistics alone, without regard to the employer's post-Act hiring and job placement efforts and without regard to the availability of jobs or of qualified applicants. Furthermore, once the plaintiff establishes its statistical "prima facie" case of employment discrimination, the employer is effectively precluded from rebutting the plaintiff's case and from even attempting to prove that the individual employees in question "were not in fact victims of previous hiring discrimination."[64]

Such a result is contrary to the legislative intent of Title VII and to the Court's pronouncements in *Griggs*, *McDonnell Douglas*, *Albemarle Paper* and *Franks*.

II.

IN FASHIONING A REMEDY IN A PATTERN OR PRACTICE CASE A DISTRICT COURT HAS DISCRETION TO AWARD RELIEF TO INDIVIDUALS ON THE BASIS OF THE DEGREE OF INJURY SUFFERED.

Once a district court has found an unlawful pattern and practice of racial discrimination, what sort of seniority relief is proper? That question, which has produced conflicting results in the Circuit Courts of Appeal, is one of the central issues in this appeal.

After finding that the defendants were in "general violation of Title VII" and that T.I.M.E.-DC had engaged in a plan and practice of discrimination, the District Court said "The next issue is whether the individuals listed have been the victims of this discrimination."[65] The Court then reviewed the government's list of individuals for whom relief was sought and the government's claim that "since these people were hired during a period in which T.I.M.E. was practicing a plan and pattern of

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64. *Cf. Franks* v *Bowman Transp., supra* at 1268.

65. Pet. A. 62.

discrimination. . . .they are members of a class affected by T.I.M.E.'s discriminatory practices." The District Court continued as follows:

> "The Court accepts this view to the extent that all are members of an affected class. However, this Court does not hold that all members were injured individually by being within the class, or that those who were injured were all affected to the same degree. This Court, in fact, does hold that some were not injured by being a member of the class, and that those who were injured were injured in varying degrees. There are no degrees of discrimination — discrimination is discrimination, and if made on the basis of race is deplorable whatever the degree; however there *are* degrees of injury due to that discrimination — and this is important in determining the equitable relief this Court should afford these individuals."

The trial court thus attempted to fashion a remedy consistent with the degree of injury suffered by the members of the affected class, recognizing that not all members of the class were necessarily injured and therefore entitled to substantial seniority carry-over simply because they were in the class.

The Court of Appeals not only rejected the specific relief awarded by the District Court, but also criticized the Court for even considering individualized proof of discrimination and injury. While this may have been partially the result of the Circuit Court's belief that only an issue of liability was before the District Court, petitioner submits that the District Court properly considered the degree of injury suffered by individual members of the class and attempted to award relief accordingly.

It is thus petitioner's position that the District Court properly considered individualized proofs, but erred in its specific findings of individual discrimination, as well as in its holding that these few individual cases proved a systemwide pattern or practice of employment discrimination. However, assuming *arguendo* the validity of the District Court's findings of individual discrimination, the proper remedy was of the sort envisioned by the District Court: individual relief to the identifiable victims of discrimination.

Consideration of the remedy issue necessarily requires an examination of individual situations. As stated by Justice Powell, "Specific relief necessarily focuses upon the individual victim, not upon some 'class' of victims."[66] However, under the decision of the Court of Appeals, the District Court is precluded from determining which individual employees were "individual or class discriminatees suffering the present effects of past discrimination", the specific question reserved for the Court under Paragraph 13(a) of the consent decree.[67] Instead, the District Court is required to give "full company employment seniority carry-over for bidding and lay-off purposes, subject . . . to the proper application of the qualification date principle,"[68] regardless of the extent of injury, if any, which the individual members of the class suffered by reason of unlawful discrimination. The Circuit Court asserted that such seniority relief was necessary to give all members of the affected class their "rightful place" in the company's work force.

While various courts have endorsed the concept of "rightful place" relief —*i.e.*, giving a discriminatee the seniority which will restore him to the position in the work force he would have occupied but for the unlawful discrimination — the application of the concept has produced different results in the various circuits.

The Fifth Circuit enunciated the doctrine in *Local 189, United Paper Makers and Paper Workers* v *United States*, 416 F. 2d 980 (5th Cir. 1969), and subsequently followed it in *Bing* v *Roadway Express, Inc.*, 485 F. 2d 441 (5th Cir. 1973). In *Bing*, which arose out of a challenge to Roadway's "no-transfer" policy, the Court stated that "How much seniority a transferee deserves should be determined by the date he would have transferred but for his employer's discrimination." 485 F. 2d 441, 450. However, the Circuit Court did not require proof of any *prior* indication of a desire to transfer from the city to the road, but held that upon proof of a *present* desire to transfer, the

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66. *Franks* v *Bowman Transportation Co., Inc., supra* at 1276, n. 8 (Dissenting opinion).

67. Decree in Partial Resolution of Suit, ¶ 13(a); Pet. A. 90.

68. 517 F. 2d 299, 321; Pet. A. 38.

employee should be awarded seniority carry-over from the city to the road as of the date the individual possessed road qualifications. Similarly, in *Rodriguez, supra*, the Fifth Circuit held that all minority employees were to be given full carry-over seniority based not upon any showing of when the individual actually would have transferred absent discrimination, but upon "whether he desires to transfer now."

In the instant case the Fifth Circuit went even further, rejecting the trial court's examination of individual situations and holding that *all* minority employees within the class were entitled to full seniority carry-over for all purposes, irrespective of whether they were injured by discrimination. In so holding the Court acknowledged that its interpretation of the "rightful place" doctrine was in direct conflict with that of the Sixth Circuit in *Thornton* v *East Texas Motor Freight*, 497 F. 2d 416 (6th Cir. 1974).[69]

In *Thornton* the Sixth Circuit specifically approved the "rightful place" theory enunciated by the Fifth Circuit, but rejected the "qualification date" formulation which gives a putative transferee carry-over seniority as of the date he had the experience necessary to qualify him for a road driving job. Instead, the Court affirmed the District Court's grant of seniority carry-over dating from six months after the transferee requested transfer or filed a charge with the EEOC. In so holding the Court noted that the qualification date formulation of the Fifth Circuit in *Bing* was not a strict application of the "rightful place" theory, in that "an employee might have become qualified to be a road driver on a given date, but he may have had absolutely no desire on that date to become a road driver."[70]

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69. The conflict with *Thornton* also was acknowledged in *Rodriguez, supra* at 64.

70. 497 F. 2d 416, 421. As noted by the government in its brief in opposition to the petitions for certiorari in the instant cases, subsequent to *Thornton* the Sixth Circuit in *Equal Employment Opportunity Commission* v *Detroit Edison Co.*, 515 F. 2d 301 (6th Cir. 1975) held that seniority relief "should be available regardless of whether an employee actually sought a transfer previously," citing the dissenting opinion of Chief Judge Phillips in *Thornton*. However, in so holding the Sixth Circuit did not repudiate the holding of the majority in *Thornton*, but instead held that "in the context of this case [*Detroit Edison*] where the previous system worked so strongly against transfers for blacks seniority should be available regardless of whether an employee actually sought a transfer previously." 515 F. 2d at 316.

In *United States* v *Navajo Freight Lines, Inc.* 525 F. 2d 1318, 1326 (9th Cir. 1975), the Ninth Circuit endorsed the concept of "rightful place," but demonstrated that in applying this concept various results are possible (and appropriate):

> "Alternatives which are open include those which permit a discriminatee to carry over seniority from the date he applied for a road driver position, or from the date he took some overt action to protest the discrimination, or from the date he qualified or would have qualified but for the discrimination for a road driver position, or from the date he was employed by the trucking company, or from the date employed at a particular terminal. Other alternatives, including direct adjustment of non-minority seniority, undoubtedly also lie within the broad remedial powers of the Court under the authority of Title VII."

The Ninth Circuit in *Navajo* adopted the Fifth Circuit's qualification date formulation in principle, but noted that frequently it was not possible to determine the qualification date. Under these circumstances the Court held that the lower court's granting of terminal seniority was appropriate. However, in approving the trial court's remedy the Ninth Circuit also remanded the case for the purpose of having the trial court consider the seniority rights of non-minority road drivers.

In *Franks* v *Bowman Transportation Co., supra,* this Court considered the application of the "rightful place" doctrine to persons who had been discriminatorily refused initial employment.[71] Noting that the Court in *Albemarle Paper Company* v *Moody*[72] had recognized the "make-whole" objective of Title VII, the Court found that this ordinarily required the granting of seniority relief "slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application."[73]

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71. The individuals in question made up "a class of black non-employee applicants for OTR [over-the-road] positions prior to January 1, 1972." 96 S. Ct. at 1258. Significantly, the class was made up only of identifiable post-Act victims of racial discrimination "whose applications were put in evidence at the trial." 96 S. Ct. at 1261.

72. 422 U.S. 405 (1975).

73. 96 S. Ct. at 1265.

While indicating that such seniority relief generally would be required, the Court indicated that in exercising its equitable discretion the district court may deny such seniority relief if it does so "for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination," citing *Albemarle Paper*.

Further limitations in the Court's holding as to the granting of seniority relief are apparent. In the first place, the Court's review in *Franks* was specifically limited to victims of *hiring* discrimination, identifiable individuals who actually filed employment applications. Secondly, the Court clearly indicated that the employer must be given the opportunity to prove that the individuals in the class "were not in fact victims of previous hiring discrimination," citing *McDonnell Douglas Corp.* v *Green*, 411 U.S. at 802, and *Baxter* v *Savannah Sugar Refining Corp.*, 495 F. 2d 437, 444 (5th Cir.) cert. den., 419 U.S. 1033 (1974). Thus, as specifically noted by the Court, the employer "may attempt to prove that a given individual member of [the] class . . . was not in fact discriminatorily refused employment as an OTR driver in order to defeat the individual's claim to seniority relief as well as any other remedy ordered for the class generally." Moreover, "evidence of a lack of vacancies in OTR positions at the time the individual application was filed, or evidence indicating the individual's lack of qualification for the OTR positions" is relevant.[74]

Finally, in concluding its opinion in *Franks* the majority again emphasized the plenary equitable power vested in the district courts in Title VII actions:

> "In holding the class-based seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under Section 706(g), we do not in any way modify our previously expressed view that the statutory scheme of Title VII 'implicitly recognizes that there may be cases calling for one remedy but not another and — owing to the structure of the federal judiciary —

74. 96 S. Ct. at 1268, n. 32.

> these choices are of course left in the first instance to the district courts.' *Albemarle Paper, supra*, 422 U.S. at 416."[75]

Petitioner submits that the decision below of the Fifth Circuit rejecting the trial court's remedy and ordering wholesale seniority relief cannot be justified on the basis that it is required by the "rightful place" doctrine. Even assuming *arguendo* that the government established a prima facie case of liability as to certain affected classes, this does not end the court's inquiry:

> "Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the class, has suffered financial loss, and thus entitled to back pay or other appropriate relief." *Baxter* v *Savannah Sugar Refining Corp., supra* at 443-44.

In this connection the criteria set forth in *McDonnell Douglas* are relevant.[76] The Circuit Court brushed aside the petitioner's rather extensive effort to demonstrate that the individual members of the affected class were not the victims of unlawful discrimination entitled to relief (other than the monetary damages which they received under the consent decree), noting that "Whatever evidentiary hearings are required for individuals can be postponed to the remedy." As indicated above, this ignores the fact that both the issues of liability and remedy were tried in the district court.

To attempt to prove that the company had engaged in an unlawful pattern or practice of employment discrimination at various terminals throughout its extensive system the government chose to take depositions at ten of the employer's terminals and to introduce certain live testimony as well, presumably utilizing its best witnesses. These witnesses were fully examined and cross-examined with respect to such questions as whether the employee was qualified for the job in

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75. 96 S. Ct. at 1271.

76. Contrary to the holding of the Fifth Circuit that *McDonnell Douglas* is "inapplicable to a pattern and practice suit" (517 F. 2d 299, 316; Pet. A. 27) or to a class action (*Rodriguez*, 505 F. 2d 40, 55).

question, whether he actually filed a job application, whether a vacancy existed, when the next employee was hired in that classification, and so forth. No effort was made to limit the inquiry on direct or cross-examination to the question of liability as to either the individual or to the class.

Petitioner believes that it was able to show both the absence of any systemwide pattern or practice of employment discrimination and that the individual employees in question were not the victims of unlawful discrimination entitled to seniority relief.[77] Under the approach of the Fifth Circuit such efforts were obviously futile, because on the question of liability ("at the liability stage") the trial court "was not compelled to credit" petitioner's contentions as to a lack of openings or the failure of purported applicants to file proper application forms, nor "to sustain the counterattack on the testimony of individual discriminatees as to credibility, availability or qualification."[78]

The petitioner's efforts were similarly wasted as to the *remedy* issue, in that the Circuit Court held that it was premature and inappropriate for the trial court to consider individualized proof at the trial. While the Circuit Court found that "it would defy reason and waste precious judicial resources for the [trial] court either to require or permit individualized proof," the fact of the matter is that the government tried its case through the introduction of such proof and there was in fact a full trial on the merits. To require the parties to return to the district court to retry the case at "evidentiary hearings" truly does seem to "defy reason and waste precious judicial resources," whether or not the court uses special masters as suggested by the Court of Appeals.

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77. See discussion at page 22, *supra*.

78. 517 F. 2d 299, 315; Pet. A. 26, 27.

III.

THE SAME STANDARDS FOR DETERMINING INDIVIDUAL RELIEF UNDER TITLE VII SHOULD APPLY, REGARDLESS OF WHETHER THE ACTION IS AN "INDIVIDUAL," "CLASS" OR "PATTERN OR PRACTICE" SUIT.

The Circuit Court's refusal to apply the "analytical steps delineated by the recent case of *McDonnell Douglas Corporation* v *Green*, 411 U.S. 792 (1973)" on the basis that the case "is inapplicable to a pattern and practice suit" has been discussed above,[79] and that discussion will not be repeated here. The Fifth Circuit's position that *McDonnell Douglas* is inapplicable to a pattern or practice case, or to a class action, or to a case involving an alleged history of hiring discrimination, should be put to rest by this Court's decision in *Franks, supra*, a class action involving an unlawful pattern of racial discrimination. While the opinion in *Franks* does not directly set forth the manner in which *McDonnell Douglas* is to be applied, it cites *McDonnell Douglas* and implicitly recognizes the applicability of the *McDonnell Douglas* criteria in determining whether individual employees within an affected class were actually damaged by racial discrimination.

Whether an individual sues or the government brings a class action the critical inquires should be the same: Was there unlawful racial discrimination, was the individual damaged thereby and, if so, what will it take to give him appropriate relief? The District Court attempted to deal with these questions and fashion a remedy accordingly. It is submitted that the evidence should be viewed in these terms, rather than simply granting wholesale seniority relief solely on the basis of race.

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79. See p. 22, *supra*.

IV.

WHERE A UNION CONTRACT PROVIDES THAT LAID OFF EMPLOYEES HAVE FIRST CALL TO REINSTATEMENT RIGHTS FOR A THREE-YEAR PERIOD, INDIVIDUAL MINORITY EMPLOYEES WHO HAVE NEVER BEEN EMPLOYED IN SUCH POSITIONS AND WHO ARE NOT FOUND TO HAVE BEEN AFFECTED BY RACIAL DISCRIMINATION SHOULD NOT BE GRANTED PRIORITY OVER LAID OFF EMPLOYEES.

Finally, petitioner submits that the Court of Appeals erred in upsetting that portion of the District Court's final order designed to protect laid off incumbents. Under the terms of the District Court order a vacancy was not deemed to exist until it continued for three years. A laid off employee on the seniority roster where an opening occurred would therefore have preference to fill a vacancy without competition from members of the "affected class" for a period of three years, consistent with a provision in the union contract to the same effect.

While acknowledging that the contractual provision in question was not adopted for discriminatory purposes, the Circuit Court nevertheless modified the lower court's decree to eliminate the contractual protection given to laid off line-drivers. Thus, under the decision of the Court of Appeals, "When a vacancy which is not a purely temporary one arises in the LD position at a T.I.M.E.-DC terminal, any LD on lay-off at that terminal may compete against members of the affected class on the basis of full employment seniority."[80] If nothing else the Circuit Court's decision on this point obviously is ambiguous, in that the company is given no guidance whatsoever in determining whether a vacancy is deemed to be a "purely temporary" one (as to which the laid off employee continues to have a preference) or whether it has become something other

80. 517 F. 2d 322-323; Pet. A. 41.

than "purely temporary" (in which case members of the affected class may compete on the basis of their company seniority).[81]

The Circuit Court also ordered changes in the modified seniority system of the Southern Area Conference to "speed up the advancement of discriminatees into the LD position."[82] The effect of this alteration would be to diminish the seniority rights of incumbent line-drivers within the Southern Conference, as well as to create administrative problems for the company.

In altering valid contractual provisions to permit the acceleration of the advancement of members of the affected class to the detriment of incumbent employees the Court would require the company and the union to engage in reverse discrimination contrary to the purpose of Title VII.[83]

As reflected by Section 703(h), Congress did not intend that Title VII be used to abolish non-discriminatory seniority provisions. Furthermore, the legislative history reflects an intent to require employers to fill future vacancies on a non-discriminatory basis, not to accelerate the progress of one group of employees at the expense of another.[84]

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81. Similar ambiguity is found in the Circuit Court's statement at the conclusion of its opinion that "the record should be developed when necessary to examine the impact of such a preference [to victims over non-victims] on current non-victim, incumbent employees who have been employed by the company longer than a particular victim." 517 F. 2d at 324, Pet. A. 44. If the Circuit Court is suggesting that the District Court on remand should provide for transfer to the road of *all* city employees — white as well as black and SSA — in effect this would create a *mandatory* transfer policy. In view of the difficulties this would create for the company in terms of retraining alone, and in light of the company's experience in Memphis, T.I.M.E.-DC opposes any such relief.

82. 517 F. 2d 299, 323; Pet. A. 42-43.

83. See p. 15, *supra*.

84. See p. 15, *supra*.

CONCLUSION

Petitioner T.I.M.E.-DC submits that the statistical and other evidence below was insufficient to establish a pattern or practice of unlawful employment discrimination at various terminals throughout its system, particularly in light of the company's acknowledged efforts and progress in eradicating the vestiges of earlier discrimination. Assuming *arguendo* that liability under Title VII was established, the District Court properly exercised its equitable jurisdiction in fashioning a remedy consistent with the degree of injury suffered by the individuals making up the affected classes. The Court of Appeals therefore erred in overturning the District Court's remedy and ordering wholesale seniority relief to all members of the affected classes, irrespective of the degree of injury, if any, actually suffered. The Court also erred, it is submitted, in holding *McDonnell Douglas* proofs inapplicable to pattern or practice cases. Accordingly the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-672

T.I.M.E.-D.C., INC.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as *amicus curiae*. The EEAC supports the position of the Respondent T.I.M.E.-D.C., Inc. in urging the Court to reverse the decision of the Fifth Circuit Court of Appeals.[1] The written consent of the parties hereto to the filing of this brief has been filed with the Court Clerk.

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[1] The EEAC also has filed a brief *amicus curiae* in another case before the Court in *East Texas Motor Freight System, Inc.* v. *Jesse Rodriguez*, No. 75-718. The EEAC's position concerning the proper role of statistics in a Title VII class

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia. EEAC was founded to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituants, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the various other Federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issues presented for the Court's consideration in this case.

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action is discussed more fully in its *Rodriguez* brief. Parties to the *T.I.M.E.-D.C.* case have been served with EEAC's brief in *Rodriguez*.

PRELIMINARY STATEMENT

In the instant case, the Court of Appeals ruled that a pattern and practice of discrimination was established which justified an award of a full seniority carryover to line driver positions for *all* minority city drivers of the employer in the alleged class. In so doing, the Court of Appeals substantially expanded upon the remedy ordered by the district court which carefully tailored the relief based upon the degree to which the evidence establishd that individual minority employees were injured by the discrimination.

In reaching this conclusion, the Court of Appeals placed substantial reliance upon its reasoning in *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 (5th Cir. 1974) which is also now before this Court for review as Case No. 75-718. Although this case and *Rodriguez* have followed somewhat different courses through the courts and present somewhat different issues, it is submitted that they both represent the tendency for an "undue emphasis" on statistics "to obscure rather than advance the judicial process." *Hester* v. *Southern Railway Co.*, 497 F.2d 1374, 1381 (5th Cir. 1974).

The issue of the proper role of statistics in a Title VII class action is now before this Court for the first time in these cases. No issue is more crucial to the rational and effective enforcement of the equal employment opportunity enactments. The standards which this Court adopts will not only affect the result in these cases, but will have a far reaching effect in cases arising in different factual contexts, and under different equal employment opportunity laws and programs.

As was stated in its brief in *Rodriguez*, the EEAC recognizes that statistics may be relevant to Title VII enforcement if used rationally and intelligently. This Court has heretofore adhered to the principle that the objectives of Title VII are to determine (1) whether there are identifiable victims of discrimination entitled to relief and (2) if so, who are those victims and what remedy is appropriate to make them whole. *E.g.*, *Franks* v. *Bowman Transp. Co.*, 47 L. Ed.2d 444 (1976). The statistical parity approach of the Fifth Circuit is not consistent with these objectives and serves instead to foster preferential treatment at odds with Section 703(j) of Title VII.

The objectives of Title VII can be achieved only if (1) statistics are assigned their proper role in the allocation of the burden of proof, and (2) sufficient authority is left to the fact finder to make adjustments based upon the nature of the discrimination alleged, the victims identified, and the remedies sought and the other facts surrounding the particular claim at issue. These guidelines were not followed in this case and, accordingly, it is these issues to which the following is directed.

PROCEEDINGS BELOW

In order to place the issues in context, it is necessary to review the proceedings below. The case arose out of two suits brought by the United States. The first, filed in May, 1968, was limited to the Nashville terminal. The second, filed in 1971, alleged system-wide discrimination at all of the Company's 51 trucking terminals. As a result of a Consent Decree which resolved most of the issues in the cases, the only

issues left for the district court to decide were whether a pattern and practice of discrimination had been established, and if so, which employees were "individual or class discriminatees suffering the present effects of past discrimination." (517 F.2d at 307).

The district court concluded that because the statistics established that the Company had not hired minorities in proportion to their numbers in the population based on Standard Metropolitan Statistical Area (SMSA) census statistics, a pattern and practice had been established. (517 F.2d at 307). The district court ordered a remedy which was based on the degree of injury which the evidence established had been suffered by potential individual discriminatees. The employees were divided into three groups in the decree, as follows (517 F.2d at 308):

> 1. Appendix A included 30 individuals who the district court found "have suffered severe injury" because of the defendant's practices. These employees were given the right (unavailable to other employees) to transfer to line positions with a seniority carryback for bidding and layoff purposes to July 2, 1965—the effective date of Title VII.
>
> 2. Appendix B included four employees. The district court found that, as to these four, the evidence "is not sufficient to show clear and convincing specific instances of discrimination" but they were "very possibly the objects of discrimination and . . . likely harmed by such discrimination." These employees were given the right to transfer to road jobs with seniority carried back to January 14, 1971—the date the systemwide suit was filed.

3. The remaining 300 plus incumbents were placed in Appendix C because the district court had "no evidence to show that these individuals were either harmed or not harmed individually by the discrimination to the class as a whole." Nonetheless, these employees were still awarded a preference for road drivers positions over the general public and other incumbent city employees.

The Court of Appeals affirmed the district court's finding of an unlawful pattern and practice of discrimination, but rejected the district court's manner of awarding relief. Apparently, it was the Court of Appeals' view that it was not the province of the district court to determine the remedy based on the degree of individual injury shown because this would "defy reason and waste precious judicial resources." Despite the reasonable assumption that the remedy stage had already been completed, the Court of Appeals made the curious statement that "whatever evidentiary hearings are required for individuals can well be postponed to the remedy." (517 F.2d at 319).

The Court of Appeals then ruled that the distinction between the three groups must be abolished and the same relief must be granted to all incumbent minority employees hired prior to 1969. Thus, the court ordered that all these minority employees should be allowed to transfer to line driver jobs and to exercise their full seniority with the Company for all purposes. (517 F.2d at 299) Further, the Court of Appeals rejected the July 2, 1965 cut-off date for the seniority carryback and held that full seniority must be awarded even though it may extend back beyond the effective date of Title VII. (517 F.2d at 320).

The Court of Appeals rationalized this conclusion on the ground that the statistical showing of past discrimination warrants a grant of full seniority carry-over to all minority employees in the alleged class because, to do otherwise, would perpetuate the consequences of past discrimination.

It is submitted that the Court of Appeals' reliance upon an invalid statistical presumption, and its application of the perpetuation of past discrimination standard in this case, is flawed in numerous respects. The district court's decision, which carefully attempted [2] to award appropriate relief to identifiable victims of discrimination, conforms with the objectives of Title VII and was not shown to be clearly erroneous. The Court of Appeals' decision which, in effect, may well grant preferential treatment to non-victim beneficiaries, is unnecessary, unjustified and contrary to Title VII objectives.

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[2] The basic principles underlying the district court's insistence that relief be granted to those who can show "individualized" discrimination are sound. Its award, however, of a bidding preference to class members of Appendix C (see *supra*, p. 6) is inconsistent with these standards.

ARGUMENT

THE COURT OF APPEALS IMPROPERLY EXTENDED THE RELIEF GRANTED BY THE DISTRICT COURT TO PERSONS WHO WERE NOT SHOWN TO BE VICTIMS OF DISCRIMINATORY CONDUCT.

A. The Court Of Appeals' Decision Is Contrary To *McDonnell Douglas* v. *Green* And Other Applicable Authorities.

After a lengthy pre-trial proceeding culminating in a consent decree resolving most issues, the issue to be tried became sharply defined. The district court was asked to determine whether the defendants had engaged in a pattern and practice of discrimination and, if so, to determine which *individuals* were injured by this pattern and practice.

In making its determination the district court's manner of proceeding followed what this Court has articulated as the standard for determining an individual's right to relief under Title VII. In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), this Court held that the plaintiff must show the following to establish a *prima facie* case:

> "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." (footnote omitted)

Each of the thirty employees who were awarded a seniority carry-over to 1965 upon transfer to line driver positions was either an applicant for original

hire or for transfer to a line driver job, or had been subjected to some other specific act of discrimination. (517 F.2d at 308 n. 16). Four more minority members were given somewhat more limited seniority carryover rights, because the evidence indicated that they were very possibly the objects of discrimination. As for the remaining employees, however, there was no evidence of discrimination against them or resulting harm. Nonetheless, even these employees were given a questionable (see *supra*, p. 7, n. 2) preferential right over incumbent city drivers or new hires for line driver jobs. Thus, under the *McDonnell Douglas* standard the district court was most liberal in awarding relief. Clearly, the district court recognized that it had no basis for awarding all employees the same relief as the thirty who had been specifically shown to have been injured.

The Court of Appeals unjustifiably discarded the district court's carefully tailored remedy and held that *all* minority employees in the alleged class were entitled to fictional seniority in road driving positions, without regard to whether they had ever indicated a desire to transfer. The Court of Appeals attempted to rationalize this on the basis that the work force statistics showing a statistical underrepresentation of minorities in the road driver positions in 1971 are dispositive of the claim of discrimination against all minority employees. Then the Court of Appeals attempted to buttress its conclusion by citing the testimony of those who had shown that they had sought and been denied road driver positions. But this testimony can only support the district court's manner of determining those injured, and the Court of Appeals' reliance on this testimony

is totally inconsistent with its arbitrarily placing 300 others in the same remedy status as the 30 who proved acts of discrimination.

The Court of Appeals attempted to distinguish the *McDonnell Douglas* case due to its "peculiar factual setting" and by its own explicit terms. What is meant by the "peculiar factual setting" is never explained. In *McDonnell Douglas* the court set out an express standard for proving that a specific minority member was discriminatorily denied a job. As the district court here recognized, the impact of discrimination on individual class members is precisely the issue to be addressed in fashioning Title VII remedies.

It is true, of course, that in *McDonnell Douglas* this Court was only directly concerned with the burden of proof in an individual case. But the same considerations should be applicable in identifying which individuals were injured in a class action or a pattern and practice case.[3] This is particularly true here because the express issue assigned to the district judge was to determine which individuals had been discriminated against.

The Court of Appeals here made two conclusions based upon workforce statistics. First, it found that

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[3] In both *Rodriguez* and this case, the Fifth Circuit attempts to distinguish *McDonnell Douglas* by pointing out that it did not involve a class action. That attempted distinction, however, does nothing more than describe how the plaintiff there chose to bring its suit. There is nothing in the language of the Court's opinion in that case that would foreclose the application of its principles to class actions.

statistics were evidence of "past discrimination." Second, it then presumed, without any further evidence, that members of the three purported classes suffered a legally cognizable injury which entitled them all to the same relief. It is this jump to the second finding which is particularly contrary to the basic objective of fairly and accurately identifying the victims of discrimination and which is most likely to result in preferential remedial awards which conflict with the objectives of Title VII. While statistics may be evidence of historical discrimination against minorities generally, it is totally inconsistent with *McDonnell Douglas* to suggest that it can be presumed from the work force statistics that additional members can be added to the group entitled to maximum relief when there is *no* evidence that they meet the *McDonnell Douglas* standard. The illogic of the Court of Appeals' reasoning is apparent: under its decision, a person can gain a finding of discrimination in a class or pattern and practice action, even though he would not be entitled to such a judgment if he brought the action as an individual.

Other courts in Title VII class actions have consistently limited relief to those persons who show they applied or otherwise manifested their interest in a position. For example, in *Franks* v. *Bowman Transportation Co.*, 47 L. Ed.2d 444 (U.S. 1976), the seniority relief was limited to a class of identifiable individual blacks who had applied for over-the-road positions and whose applications were put in evidence at trial. (47 L. Ed. at 457, 458 n. 10) The same approach was followed by the Sixth Circuit in *Thornton* v. *East Texas Motor Freight*, 497 F.2d 416,

419 (6th Cir. 1974) where the Court enjoined the discriminatory practice for the benefit of blacks generally, but the class entitled to a full seniority carryover was properly limited to those city drivers who specifically requested a transfer or who filed a charge of discrimination with the EEOC. Similarly, in *ACHA* v. *Beame*, 531 F.2d 648 (2nd Cir. 1976), the Second Circuit, to insure that the relief is limited to those "who had actually been discriminated against," set out the following test (531 F.2d at 656):

> "For guidance of the district court, we suggest that the burden of satisfying the court on this issue by a preponderance of the evidence should be on the individual plaintiff. The female police officer might, for example, satisfy her burden by demonstrating that she actually filed an application for employment or wrote a letter complaining about the hiring policy early enough during the period of discrimination, or offer proof that she had expressed a desire to enlist in the police force but was deterred by the discriminatory practice barring females."

By analogy, the courts have consistently held that proof of actual damages must be predicated on a showing that the class members were qualified for and denied particular vacancies. *Green* v. *Missouri Pacific R.R. Co.*, 523 F.2d 1290, 1299 (8th Cir. 1975); *Hairston* v. *McLean Trucking Co.*, 520 F.2d 226, 231-232 (4th Cir. 1975); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 314-16 (6th Cir. 1975), petition for cert. pending in Case No. 75-220; *Norman* v. *Missouri Pacific R. R. Co.*, 497 F.2d 594 (8th Cir. 1974). Indeed, as the Fifth Circuit stated in *Baxter*

v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 444-45 (5th Cir. 1974):

> "[T]he initial burden will be on the individual discriminatee to show that he was available for promotion and possessed the general characteristics and qualifications which are shown . . . to be possessed by the higher paid white employees and are job related."

See also, *Wright* v. *Stone Container Corp.*, 524 F.2d 1058, 1062 (8th Cir. 1975) where the Court affirmed dismissal of a class action when the named plaintiff was unable to establish a *prima facie* case under the *McDonnell Douglas* standard, and because "he could only speculate that approximately 200 past and present employees" were also affected by the challenged practices.

In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975), this Court stated that the standard for review of a district court's determination in a Title VII case is whether it "was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case." And, as recognized in *Franks* v. *Bowman*, *supra*, 47 L.Ed.2d at 465, a seniority award is not a requisite in all circumstances: "the fashioning of appropriate remedies involves the sound equitable discretion of the district court."

In this case the district court heard exhaustive evidence and based its decision on a careful analysis of the relative injury to individuals in the class. The Court of Appeals made no attempt to refute the district court's factual findings as to who are the

identifiable victims of the alleged discrimination. The relief awarded by the district court is supported by both the facts and the applicable legal principles; indeed, as noted above, p. 7, n. 2, the district court went beyond what might otherwise be authorized in awarding relief to the Appendix C employees. There was, therefore, no basis for the Court of Appeals' reversal.

B. The Failure Of The Court Of Appeals To Recognize The Fallacies In Its Statistical Presumption Resulted In An Impermissible Award Of Preferential Treatment.

Premised upon the statistical underrepresentation of minorities in the line driver positions as of 1971, the Court of Appeals concluded that a *present pattern and practice* of discrimination against *all* minority employees had been established. The Court failed to recognize, however, that many of the positions which make up the statistics upon which it relies were filled prior to the effective date of Title VII. Thus, work force statistics alone are not a reliable indicator of whether the members of the purported class have been victims of discrimination subsequent to 1965.

No one is contending that underrepresentation statistics cannot be indicative of pre-Act discriminatory practices. But if the focus is solely on unexamined work force statistics, a pattern and practice of discrimination finding will always be present and cannot be rebutted unless and until the employer achieves a racial balance equivalent to the Standard Metropolitan Statistical Area Ratios.

However, Section 703(j) of Title VII (42 U.S.C. § 2000e-2(j)) expressly states that "[n]othing contained in this title shall be interpreted to require any

employer . . . to grant preferential treatment to any individual or to any group . . . *on account of an imbalance which may exist* with respect to the total number or percentage of persons of any race . . . employed by the employer . . . in comparison with the total number or percentage of such race . . . in any . . . area . . . or in the available work force in any . . . area." [Emphasis added]. As this provision was explained in the legislative history:

> "[t]here is no requirement in Title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such balance may be would involve a violation of Title VII because maintaining such balance would require an employer to hire or to refuse to hire on the basis of race." Interpretive Memorandum of Title VII of H.R. 7152 Submitted Jointly by Senators Clark and Case. Floor Managers, 110 Cong. Rec. 7212, 7213 (1964).

In effect, therefore, by presuming discrimination because of underrepresentation statistics, the court is presuming all employers to be guilty of discrimination until they achieve an appropriate racial balance—an interpretation which is directly contrary to Congressional intent.

The danger of this type of fallacious reliance upon work force statistics is illustrated by *Watkins* v. *Steelworkers*, 516 F.2d 41 (5th Cir. 1975). There the district court found liability in favor of the entire class of black incumbent employees because the operation of a seniority system resulted in the employer's work force being virtually all white. This, in turn, led to a remedial order requiring quotas to achieve statistical parity. The Court of Appeals re-

jected this order because, despite the absence of blacks in the work force, there was no evidence that the class the work force, there was no evidence that the class members "had suffered individual discrimination at the hands of the Company" (516 F.2d at 46). As the court stated further:

> "To hold the seniority plan discriminatory as to the plaintiffs in this case requires a determination that blacks not otherwise personally discriminated against should be treated preferentially over equal whites. The facts reveal that none of plaintiffs sought employment with the Company before 1965, the effective date of Title VII. And additionally, the district court did not find that the Company has discriminated in hiring since 1965. The result which plaintiffs seek, therefore, is not that personal remedial relief available under Title VII, but rather a preferential treatment on the basis of race which Congress specifically prohibited in Section 703(j)."

In other words, the work force statistics showing a virtual absence of blacks were not determinative of liability because the statistics resulted from acts occurring before the effective date of Title VII. This was not recognized, however, until the Court of Appeals, unlike here, centered upon whether there were identifiable victims of discrimination, rather than solely on work force statistics.

In this case, certain victims were identified by the district court who were shown to have been specifically injured by the employer's practices. But, the addition by the Court of Appeals of 300 persons who were not shown to have suffered individual discrimination, stems from the same logical fallacy as the district court's presumption of discrimination in

Watkins. It presumes present discrimination, not because those 300 were shown to be victims of discrimination, but because of a failure to reach statistical parity caused, at least in part, by pre-Title VII conduct.

Viewed from a somewhat different perspective, what must be recognized is that, to the extent that the Court of Appeals relied upon work force statistics rather than on evidence of injury to identifiable victims of discrimination, the most that can be presumed from the statistics is a possibility of *past discrimination against minorities generally*. To attempt to determine solely from numerical ratios *who* might be the *victims* of either past or present discrimination is logically impossible. Indeed, if the issue of *present* discrimination is to be determined solely by statistics, the only logical comparison is with the present statistics on *hiring of minorities generally* for line driver positions. These statistics show that by the time of the district court decision the Company was hiring blacks for line driver positions *at a rate of 64%* (517 F.2d at 316, n. 31). If statistics are to be determinative, therefore, the most relevant statistics establish that the Company is *not* engaged in a present pattern and practice of discrimination against minorities.

The Court of Appeals, of course, also relied upon specific evidence of persons who testified to past discriminatory conduct against them. No one is suggesting that these persons do not have a right to prove that they are the present victims of past discrimination. Indeed, this is precisely the approach employed by the district court. The point is, however, that the *only* additional reason given by the

Court of Appeals for its finding that *all* minority city drivers are presently being discriminated against is a statistical showing which, in the Court's view, evidences past discrimination against minorities generally. This establishes nothing as to *who* may have been the victims of either past or present discrimination.

As Congress perceived in adding Section 703(j) to Title VII, the emphasis on reaching a specific racial balance may have the tendency to result in preferential treatment. The Court of Appeals did not heed this warning and evidenced no real awareness of the practical result of its holding. It granted fictional seniority in road driving positions to 300 city drivers who had not demonstrated that they had applied for or otherwise manifested an interest in road driver positions. These rights are in preference to hundreds of employees (a large percentage of whom are minority)[4] who specifically applied for and were hired or transferred into road drivers jobs. These drivers now may be bypassed, notwithstanding their legitimately obtained seniority rights. They may understand the legitimacy of the seniority rights granted to the 30 victims identified by the district court as having sought and been denied line driver and other positions at an earlier date. However, the seniority rights granted to 300 other city drivers who did not show injury can only be perceived by the incumbent road drivers as unfair preferential treatment.

The Court of Appeals in rejecting the significance of Section 703(j) simply begs the question. It con-

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[4] The record shows that 30 percent of line drivers whose seniority rights will be jeopardized are minority (517 F.2d at 316, n. 31).

tends that it is "well established" that the remedy it imposed is permissible. As shown above, however, to the extent the remedy flows to persons who were not shown to be victims of acts of discrimination, the remedy is contrary to well established authority. The Court of Appeals then attempts to justify the remedy based upon cases authorizing temporary quota relief in a hiring context. But an analysis of those cases only serves to further emphasize the care which must be taken to insure that an undue reliance upon statistical inferences does not result in impermissible preferential treatment.

As Judge Clark observed in his concurring opinion in *Morrow* v. *Crisler*, 491 F.2d 1053, 1060 (5th Cir. 1974), "no holding by this or any other court has yet spelled out how quota relief can be squared with constitutional fundamentals." Justice Douglas expressed his concern in *De Funis* v. *Odegard*, 416 U.S. 312, 343-44 (1974):

> "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. . . .
>
> "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordianlike quality . . . So far as race is concerned, any state sponsored preference to one race over another in that competition is in my view 'invidious' and violative of the Equal Protection Clause."

Because of these constitutional difficulties, and the cited language in Section 703(j), the courts have had difficulty in rationalizing preferential relief.[5]

Generally, preferential hiring rights or temporary quotas have been limited to cases in which the statistical disparity is great, the defendant's conduct is particularly egregious or the defendant has been particularly intransigent in remedying discrimination by other means. For example, in *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1972), it was noted that the defendant city had had only one black fireman in 25 years. In *United States* v. *Ironworkers, Local 86*, 315 F.Supp. 1202 (D.Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir. 1971), it was noted that less than one percent of the union membership was black. In *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974), a temporary quota was authorized because no significant improvement in the number of blacks in the Mississippi Highway Patrol had been shown in the last two years since the entry of the district court's initial decree. In *United States* v. *Lathers, Local 46*, 471 F.2d 408 (2d Cir. 1973), a quota was ordered only after the union was cited for contempt in failing to comply with a court-approved settlement agreement.

In the instant case, the Court of Appeals specifically noted that the company's "recent hiring progress stands as a laudable effort to eradicate the effects of past discrimination" (517 F.2d at 316). This case, therefore, does not involve an intransigent employer or union, and where preferential treatment

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[5] See Judge Hays' dissent in *Rios* v. *Steamfitters, Local 638*, 501 F.2d 622 (2d Cir. 1974).

may possibly be justified because of a virtually total and continuing exclusion of minorities generally.

The Second Circuit's approach to the preferential question is particularly instructive. Recognizing the possible constitutional infirmities in the grant of preferential treatment, that court has allowed temporary quotas only in the most extraordinary circumstances and only when "the effects of the reverse discrimination will be defused among an unidentifiable group of unknown potential applicants." *EEOC* v. *Local 638*, 12 FEP Cases 755, 761 (2d Cir. 1976).

Thus, for example, the Court refused to award preferential relief in determining promotional rights because the effect on those not favored "would be harsh and can only exacerbate rather than diminish racial attitudes." *Bridgeport Guardians, Inc.* v. *Members, Bridgeport Commission*, 482 F.2d 1333, 1350 (2d Cir. 1973). It is submitted, that the same considerations should mitigate against the remedy in this case which favors victimless beneficiaries over numerous other employees—both black and white—who may be bypassed by the favored employees.

Finally, the comments of Judge Feinberg in his concurring opinion in the *Local 638* case should be considered. He first expressed doubts as to the validity of quotas and then emphasized the following (12 FEP Cases at 766):

> "Focusing on individuals rather than on groups in granting relief, as by providing an immediate remedy to identifiable plaintiffs who were themselves discriminatorily denied jobs, can accomplish much without resort to quotas. Cf. Acha v. Beame, 12 FEP Cases 257, slip op. 2041 (2d Cir.

> Feb. 19, 1976). The remedy would go to all who fell into this category and would be based, not upon a percentage or quota perhaps forbidden by section 703(j), but upon proof of individual discrimination."

In this case the district court focused on individuals who were found to have been discriminatorily denied line driver jobs. But the Court of Appeals focused on statistics rather than on identifiable victims. This resulted in a preferential remedial award contrary to the intent of Title VII. The reversal of the district court was clearly error.

CONCLUSION

It is submitted that the guiding principle for Title VII was succinctly stated by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), as follows:

> "Discriminatory preference for any group is precisely and only what Congress has proscribed."

It is the concern of the EEAC that an undue reliance upon statistical inferences of discrimination as evidenced by this case and others can undermine this basic objective. Statistics should be assigned no greater weight than is consistent with fairly and accurately identifying the victims of discrimination. The Court of Appeals' fallacious application of its statistical presumption in this case cannot be justified. The district court's careful attempt to determine the actual victims complied with the intent of Title VII.

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IN THE SUPREME COURT OF THE UNITED STATES

T.I.M.E.-D.C., Inc.,

PETITIONER

VS. NO. 75-672 CFX

UNITED STATES OF AMERICA, et al.,

RESPONDENTS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE, OVER THE ROAD DRIVERS ASSOCIATION, INC.

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STATEMENT OF INTEREST

This brief is presented on behalf of Over The Road Drivers Association, Inc., a non-profit corporation organized and existing under the law of the State of Tennessee. Members of the corporation are all currently employed as over the road drivers by major trucking companies of the United States. As of the date of filing of this brief, over 900 over the road drivers are members of the organization.

As over the road drivers, the members of the corporation are directly interested in and affected by judicial orders which seek to implement the provisions of the Civil Rights Act of 1964, particularly in the area of grant

concluded without substantial dissent that the long maintained system of separate seniority lists and boards for the two categories of drivers have been used, if not in fact devised, to initiate and maintain racial discrimination to the end that the more desirable over the road driver positions were exclusively reserved to white drivers; with the black and other minority drivers being relegated to the city driver positions.[2]

The findings of the courts in this regard are too well established, and too well grounded in the evidence presented to permit of any argument to the contrary at this point, and it is not the intention of this association to address itself to that question.

Once it is assumed, however, that the discriminatory aspects of such lines of seniority were violative of the Civil Rights Act of 1964, the problem of appropriate judicial action pursuant to the mandate of the legislation remains unsolved.

Initially, the legislative history of the Act itself indicates the great likelihood that the Congress did not intend that the judicial decisions implementing its provisions be in form which would in any way cause the weight of change to rest upon the shoulders of previously employed drivers who had worked over the years under a system not of their making. It is submitted that any solution to the problem which serves to jeapordize vested seniority rights of presently employed over the road drivers in any particular is reverse discrimination in its purest form, and causes innocent laborers to bear

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[2] Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968); J. D. Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974); Sabala v. Western Gillette, Inc., et al., 516 F.2d 1251 (5th Cir. 1975).

the cost of remedying a wrong which is not, and never has been, of their creation.

That the Congress was concerned that the legislation not be made the vehicle for impairment of seniority rights previously earned by existing workers within an industry is amply demonstrated by a memorandum prepared by the Department of Justice at the request of Senator Joseph Clark of Pennsylvania, one of the floor leaders urging passage of the legislation. That memorandum, in relevant part reads:[3]

> First, it has been asserted that Title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect on seniority rights existing at the time it takes effect. If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes. . . It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is "low man on the totem pole" he is not being discriminated against because of his race. Of course, if the seniority rule itself is discriminatory, it would be unlawful under Title VII.

A second memorandum was prepared directly by Senators Joseph Clark and Clifford Case, and states flatly that Title VII would have no effect on established seniority rights and that an employer would never be obligated or, in fact, permitted to give newly-hired black

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[3] 110 Cong. Rec. 7207 (1964)

employees any form of special seniority rights at the expense of an earlier hired white worker.[4]

It is true that the memoranda in question were concerned with a situation where newly hired minority employees were claiming judicially created seniority rights based upon the allegation that but for the previous discriminatory practices they would have been hired at an earlier date. Under the circumstances presented by this litigation, a different situation exists factually in that the city drivers who are now given the right to transfer to over the road status are persons who have worked for the same employer for some appreciable length of time. They are not being newly hired; and they do have creditable employee time with the employer who has previously maintained a discriminatory seniority list. It is most earnestly submitted, however, that this factual distinction should not be used as the device to allow transfer of seniority rights intra-employer in such manner as to deprive existing over the road drivers of job security; job bidding rights and other benefits which they have become entitled to solely because of their own years of service to the employer and the industry.

The basis upon which so-called "slot seniority" transfer orders rest is the analysis first made by Judge Butz-

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[4] 110 Cong. Rec. 7213 (1964). The memorandum read, in part: "Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non-discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of white workers hired earlier.

ner in **Quarles v. Philip Morris, Inc.**[5] In Quarles, the court held that seniority system, whether created following the effective date of the Act or implemented long prior to that date, could withstand the sanction of the Act if the system was discriminatory in its nature.[6]

An early analysis of possible solutions to this problem has had considerable impact upon at least some of the courts which have found discriminatory seniority practices which predated the effective date of the act to be present. The law review note postulated three approaches, each of which was given an artful name. It was the argument of the author that present effects of a past pattern of discrimination were properly within the reach of Title VII, and that any one of the three suggested approaches could be taken to remedy that discriminatory policy's present effect on the discriminatee. These were styled, variously, the "status quo", the "rightful place" and the "freedom now" solution. Stated in an over-simplified manner, the "freedom now" approach would require that the discriminating employer immediately grant reallocation of job positions which would serve to give to blacks with plantwide senority the right to immediately take any job for which he was qualified even at the price of displacing a junior white incumbent in that job. The "status quo" view would be to the effect that accrued seniority rights of white workers would be left intact. Present job allocation would remain undisturbed. Even though the seniority rights held by the incumbent white workers were found to have been

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[5] 279 F. Supp. 505 (E.D. Va. 1968)

[6] In the opinion, Judge Butzner said: ". . . Congress did not intend to freeze an entire generation of Negroe employees into discriminatory patterns that existed before the act." 279 F. Supp. 505, at 516.

gained during the continuance of the discriminatory practices, the white workers' individual rights pursuant to that seniority would remain inviolate. The third alternative, or so-called "rightful place" view would eliminate the effects of past discrimination by adjusting seniority rights, but only with respect to future opportunities. The view would allow the incumbent black worker to compete for job openings on the basis of total employment seniority rather than on the basis of job or departmental seniority.

This analysis, and its stated exclusive alternatives, has exerted great influence on the courts in the years since its publication. The difficulty with this view, from the standpoint of the trucking industry is that its mode and method of operation is disparate from that of the usual industrial relationship which was involved in the reasoning of the author of the note and the courts which were considering the earlier cases. In Quarles, for example, the company had maintained departmental seniority rosters. The plaintiff, a black worker in the prefabrication department, had nine years on that departmental roster. He then sought to transfer into the warehouse shipping and receiving department in order to seek a job as a truck driver. The shipping and receiving department had been an all-white department until 1966.

The result of the holding in Quarles, therefore, was to allow the discriminatee to transfer from his existing department to the shipping department, with his plantwide seniority intact. The result would be that such transferring employee would be able to secure any available truck driving position open in that department if his total seniority time exceeded that of another applicant with lesser total seniority.

In this situation presented by the previous maintenance of dual seniority lists between city and road drivers, however, the effect of such an order is not at all similar in its impact upon drivers with previously acquired road seniority rights. As established by the evidence in the court below in this case, the job rights of drivers within each of the boards are affected not only on a position-availability basis — as was true in Quarles — but also on status within that job classification. Senior drivers—in fact all drivers on road status—bid for jobs on a periodic basis; their status as being on regular run status or "extra board" position is a direct factor of their accumulated seniority. While, in the usual industrial context, the only questions which must be resolved by the court in applying the so-called "rightful place" of the discriminatee is job availability and lay-off status, much more is in question in this instance. In Quarles, if the transferring employee is granted the seniority rights he has accumulated on the separate seniority line, the only detrimental result to the incumbent white worker is loss of immediate opportunity to advance into a higher or different category of employment. In the instant case, however, the transferring employee, by being "slotted" into the road seniority list effectively displaces an existing employee as to rights previously acquired — not only as to future job opportunity.

In Local 189, **Papermakers v. United States,**[7] the court recognized that white incumbent workers should not be displaced from their present positions by transferring

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[7] 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

minority discriminatees with greater employer-seniority.[8]

The gross distinction between the two situations can be readily demonstrated by the use of a hypothetical comparison. Assume that Employer "A" is engaged in a manufacturing and distribution operation. As part of its business, the employer hires warehouse workmen, assembly line workers, and truck drivers who move the completed product from the manufacturing facility to wholesale outlets. Assume further that the employer hires a normal total of ten truck drivers in its business. If, at any time, one of the ten existing truck drivers jobs becomes vacant, or if additional job openings are created because of an increase in business, the "rightful place theory" would require that any otherwise qualified employee with 10 years plantwide seniority be entitled to fill that existing vacancy in preference to another worker who had acquired less than ten years seniortiy — even though the 10 years seniority had been acquired in a previously maintained separate and discriminatory seniority list which did not, under its terms, apply to truck driving positions. In such a situation the **only** detriment to the white employee is the fact he is not to be permitted to move into the truck driving job as early as otherwise would have been the case.

In the instant case, however, if it be assumed that previously discriminatory dual seniority lists have pre-

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[8] id, at 988, where the court said: "The Act should be construed to prohibit the **future awarding** of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their **present** positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation."

cluded the transfer from a city driver position to a road driver position, the allowance of transfer with seniority rights does not properly fit the category of "rightful place", but, rather, has the practical effect of the "freedom now" approach. The incumbent white road drivers are not here seeking a job as a truck driver and being deprived of the opportunity to fill such a job opening in order to cure previous discrimination against minorities. Rather, immediately the city driver is "slotted" to the seniority list, existing and present attributes of the job position previously held by the white worker are detrimentally affected. This was not the intention and is not the permissible purpose of the Civil Rights Act of 1964.

While distinguishable on its facts, and on the legal issues in question, the language of the court in **Waters v. Wisconsin Steel Works,**[9] established the view that it was not the purpose of the Act to legally sanction reverse discrimination which would place the full burden of curing the discriminatory practices of employers and unions upon the incumbent innocent white employees.[10]

That an absolute slotting transfer between the city and road seniority lists could well serve to grant an improper preference to the transferring driver and undue prejudice to the incumbent road drivers was noted by

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[9] 502 F. 2d 1309 (7th Cir. 1974)

[10] id., at 1320, where the court stated: "Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences."

the court in **Sabala v. Western Gillette, Inc.**[11] In that case, the opinion noted that the city drivers, during their early tenure as employees, had enjoyed the right to a guarantee of forty hours work per week; an established and obligatory minimum weekly wage; and a price for their work not far removed from the hourly rate of road drivers. Additionally, the road drivers similarly situated, had no hourly guarantee per week; and were required to pay their personal expenses while on the road. The conditions of work, again particularly during the years of low seniority on each of the separate lines of progression, were heavily weighted in favor of the city drivers, who were at home every night, and on every week-end; while the junior road drivers spent many days and weeks absent from their homes and routinely were required to work over week-end periods.[12]

The very real economic impact of a grant of slot seniority as an acceptable and routine solution to previously discriminatory practices under the act was forecast and discussed by the dissenting justices in **Franks v. Bowman Transp. Co., Inc.**[13] In Franks, the case presented the question whether identifiable applicants who were denied employment because of race after the effective date and in violation of Title VII could be awarded seniority

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[11] 516 F. 2d 1251 (C.A. 5th 1975)

[12] id., at 1255, where the court stated: "The trial judge noted that such a complete merger of the seniority lines would prejudice recently hired or transferred road drivers including minority drivers because they could be bumped off their job by city drivers with lower seniority on the city roster. Further, city employees who during the early years of their employment have enjoyed a weekly guarantee and consequent higher pay as compared to similarly situated road drivers would be permitted to move to the road with a resulting freeze of lower seniority men in the least attractive low-paying road jobs."

[13] 96 S. Ct. 1251 (1976)

status retroactive to the date of their respective employment applications. A majority of the Court, in opinion by Mr. Justice Brennan held that such order was within the power of the court, and that such was an acceptable if not exclusive way to deal with the problem of curing the present effects of earlier discriminatory practices. While the majority recognized that Sec. 706(g) of the act mentioned back pay awards as the only remedy, the opinion concluded that the act, in overall provision, vested broad powers to the courts to fashion equitable relief which would serve to cure the effects of past discrimination.[14]

It is further the case, however, that the majority itself recognized that an award of retroactive seniority was not required under the acts provisions, and, indeed, was not requisite in all circumstances.[15]

The majority disposed of the claims of persons holding rights of seniority pursuant to the existing seniority list treatment as being not of such nature as to preclude their conclusions. This was approached from two points. Initially, the majority concluded that a sharing of the burden of past discrimination is presumptively necessary; with this conclusion being grounded in part upon the holding that the attainment of a great national policy should not be confined within the limits of equitable relief applicable in private controversies.[16] Second,

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[14] id., at 1264, where the Court said: "This is emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination in hiring." See also: Note 21, at page 1264.

[15] id., at page 1267

[16] id., at page 1271

the majority found that seniority rights are not indefeasibly vested, and may be modified by statutes furthering a strong public interest[17]

In his concurring and dissenting opinion, Chief Justice Burger succinctly stated the inherent impropriety of the majority's view. He said:[18]

> ". . . I would stress that although retroactive benefit-type seniority relief may sometimes be appropriate and equitable, competitive type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning. More equitable would be a monetary award to the person suffering the discrimination."

Mr. Justice Powell, joined by Mr. Justice Rehnquist, was of the view that a distinction should be drawn between "benefit seniority" and "competitive seniority".[19] Benefit seniority, having to do with economic fringe benefit entitlement, such as vacation time, pension benefits, and similar matters, can obviously be ordered granted to discriminatees without impairing in any way the job security or job rights of existing employees. To the contrary, a grant of competitive seniority on a retroactive basis will have an immediate bearing and effect on the job circumstances of existing innocent employees.

Perhaps the most telling argument in favor of the

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[17] id., at page 1271.

[18] 96 S. Ct. 1251, at 1272.

[19] id., at 1273, where the dissent states: "Its (the majority) holding recognizes no meaningful distinction, in terms of the equitable relief to be granted, between "benefit-type" seniority and "competitive-type" seniority."

dissent view in Frank, is the undoubted fact that a grant of retroactive seniority on a competitive as well as benefit base as a substituted remedy for back pay award to the aggrieved employee, serves to remove entirely from the shoulders of the employer and the involved union any burden required in order to corect their prior discrimination and places that burden upon the weaker economic shoulders of purely innocent employees. It is one thing to visit the sins of the father upon the sons; it is quite another to relieve the sons of the sinning father, and visit his earlier sins on the sons of strangers to the misdeed.

In ultimate result, the routine grant of retroactive seniority rights in cases arising under Title VII will undoubtedly be looked upon with favor by those persons most directly responsible for the discrimination in the first instance. Both the employer and the union will be faced with the responsibility for payment of back pay benefits to those persons discriminated against if that solution to the problem is adopted by the courts. On the other hand, if the effects of past discrimination are cured by a grant of retroactive seniority, there will be no economic impact on either.

In sum, the approval of the Court of relief confined to a grant of full retroactive seniority to past discriminatees will have economic and social consequences which are totally inconsistent with the principles of equity, and with the broad purposes of the Civil Rights Act of 1964. There can be no question but that, since 1964, many employers have made good faith efforts to comply with the spirit of that legislation. Those efforts have included the hiring of minority employees on a broad scale. As applied to the instant case, this would include the undoubted fact that trucking firms across the nation have

hired many minority drivers as over the road drivers in the last ten years. Those minority drivers have now begun to accumulate both benefit and competitive seniority. There is no doubt but that the granting of slot seniority rights to persons earlier discriminated against will adversely affect the job security of those minority drivers. Across the nation today, instance after instance can be recorded wherein black drivers hired in recent years for over the road service are being laid off or lowered from bid-run status to extra board status because their earned positions on the seniority roster have been altered by ordered transfer of drivers from the city roster to over the road status. Most paradoxical of all is the fact that in many instances, the transferring city driver is not of a minority race, and is not in that category of persons which the act was designed to serve.[20]

CONCLUSION

The purposes and objectives of the Civil Rights Act of 1964 are not well served by orders which attempt to cure earlier discrimination at the expense of the job security of innocent workmen, many of whom are themselves members of ethnic minorities. Other available relief serves to cure the past inequities and forecast a future labor situation which precludes discrimination without infringing upon the economic well-being of the present labor force. Equity demands and reason dictates that benefit seniority not be the usual or preferred solu-

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[20] A clear example of this type situation is involved in the case of Cox v. Gordons Transports, Inc., 513 F.2d 630, (C.A. 6 1975), in which slot seniority orders have now resulted, in the transfer of six city drivers to over the road boards. Four of the drivers are black, two are white. The result of the transfer has been the lay-off of five over the road drivers with lesser seniority. All are black.

tion to the multi-faceted problem of past discrimination. Back pay relief, coupled with benefit-type seniority, and a plan of job security to discriminatees accords with the intent of the Act, and with established principles of equity.

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